IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 2

ARTHUR HAMM, JR.,

Petitioner,

—v.—

CITY OF ROCK HILL.

No. 5

FRANK JAMES LUPPER, *et al.*,

Petitioners,

—v.—

ARKANSAS.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA AND THE SUPREME COURT OF THE STATE OF ARKANSAS

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Opinions Below

1. *Hamm* v. *Rock Hill.* The opinion of the Supreme Court of South Carolina (R. Hamm 101) is reported at 241 S. C. 446, 128 S. E. 2d 907 (December 6, 1962). The order of the Sixth Judicial Circuit Court of York County, December 29, 1961, is unreported (R. Hamm 96). The oral sentenc-

ing of the defendant in the Rock Hill Recorder's Court, June 29, 1960, is unreported (R. Hamm 96).

2. *Lupper* v. *Arkansas*. The opinion of the Supreme Court of Arkansas (R. Lupper 76) is reported at —— Ark. ——, 367 S. W. 2d 750 (May 13, 1963). The supplemental opinion denying rehearing of the Supreme Court of Arkansas (R. Lupper 89) is reported at —— Ark. ——, 367 S. W. 2d 760 (June 3, 1963). The Pulaski County Circuit Court delivered no opinion (R. Lupper 75). The jury fixed the sentences (R. Lupper 74).

Jurisdiction

1. *Hamm* v. *Rock Hill*. The final judgment of the Supreme Court of South Carolina, which is the order denying rehearing, was entered on January 11, 1963 (R. Hamm 106). The petition for certiorari was filed April 10, 1963, and granted June 22, 1964 (R. Hamm 108).

2. *Lupper* v. *Arkansas*. The final judgment of the Supreme Court of Arkansas, which is the order denying rehearing, was entered June 3, 1963 (R. Lupper 89). The petition for certiorari was filed September 3, 1963, and granted June 22, 1964 (R. Lupper 91).

The jurisdiction of this Court in each of these cases is invoked pursuant to 28 U. S. Code §1257(3), petitioners having asserted below and here the denial of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

1. Does the Federal Civil Rights Act of 1964 compel the reversal of these convictions, as a matter of federal law?

2. Must these cases be remanded to the state courts, for consideration there of the effect of the Federal Civil Rights Act?

3. Do these convictions result in the enforcement of racial discrimination against petitioners, with such admixture of "state action" as to bring to bear the guarantees of the Fourteenth Amendment?

4. Can these convictions stand against due process vagueness objections, in view of the fact that the conduct shown in the record does not fall within the language of the statutes applied?

5. Did the refusal of the trial judge to require the prosecutor in the *Hamm* case to specify the law under which the defendant was charged, the consequent indefinite form of the jury instructions, and the varying statutory grounds on which Hamm's conviction was affirmed by the state appellate courts, deprive petitioner of due process of law?

Constitutional Provisions, Statutes and Ordinance Involved

1. This case involves the following provisions of the Constitution of the United States:

Article 1, Section 8, Clause 3;
Article VI, paragraph 2;
The Fourteenth Amendment.

2. This case also involves the following statutes of the United States:

Civil Rights Act of 1964, Title II, 78 Stat. 243-246, set forth, *infra*, at p. 1a;

1 U. S. C. §109, 61 Stat. 635:

Repeal of statutes as affecting existing liabilities.— The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

3. This case also involves the following South Carolina Statutes and Ordinance of the City of Rock Hill:

Section 16-386, Code of Laws of South Carolina, 1952, as amended 1954:

Entry on another's pasture or other lands after notice; posting notice

Every entry upon the lands of another where any horse, mule, cow, hog or any other livestock is pastured, or any other lands of another, after notice from the owner of tenant prohibiting such entry, shall be a misdemeanor and be punished by a fine not to exceed

one hundred dollars, or by imprisonment with hard labor on the public works of the county for not exceeding thirty days. When any owner or tenant of any lands shall post a notice in four conspicuous places on the borders of such land prohibiting entry thereon, a proof of the posting shall be deemed and taken as notice conclusive against the person making entry, as aforesaid, for the purpose of trespassing.

Section 16-388, Code of Laws of South Carolina, 1952, as amended 1960:

Any person:

(1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned, within six months preceding, not to do so or

(2) Who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative, shall on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

Section 19-12, Code of Laws of the City of Rock Hill:

Entry on lands of another after notice prohibiting the same

Every entry upon the lands of another, after notice from the owner or tenant prohibiting the same, shall be a misdemeanor. Whenever any owner or tenant of any lands shall post a notice in four conspicuous places

on the border of any land prohibiting entry thereon, and shall publish once a week for four consecutive weeks such notice in any newspaper circulating in the county where such lands situate, a proof of the posting and publishing of such notice within twelve months prior to the entry shall be deemed and taken as notice conclusive against the person making entry as aforesaid for hunting and fishing.

4. This case also involves the following Arkansas Statutes:

Arkansas Statutes §41-1433 (Act 14 of 1959):

Any person who after having entered the business premises of any other person, firm or corporation, other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment.

Arkansas Statutes, §1-103 (1947):

Repeal of criminal or penal statute—Effect on Offenses Committed.—When any criminal or penal statute shall be repealed, all offenses committed or forfeitures accrued under it while it was in force shall be punished or enforced as if it were in force, and notwithstanding such repeal, unless otherwise expressly provided in the repealing statute. [Act Dec. 21, 1846, §1, p. 93; C. & M. Dig., §9758; Pope's Dig., 13283.]

Arkansas Statutes, §1-104 (1947):

Existing actions not affected by repeal.—No action, plea, prosecution or proceeding, civil or criminal, pend-

ing at the time any statutory provision shall be repealed, shall be affected by such repeal, but the same shall proceed in all respects as if such statutory provision had not been repealed, (except that all proceedings had after the taking effect of the revised statutes, shall be conducted according to the provisions of such statutes, and shall be in all respects, subject to the provisions thereof, so far as they are applicable). [Rev. Stat., ch. 129, §31; C. & M. Dig., §9759; Pope's Dig., §13284.]

Statement

1. *Hamm* v. *City of Rock Hill*

Petitioner Hamm, a Negro college student, and Reverend C. A. Ivory, a Negro minister, were arrested for a sit-in demonstration at the lunch counter of McCrory's variety store in Rock Hill, South Carolina on June 7, 1960. They were convicted of "trespass" and sentenced to pay a fine of $100 or spend 30 days in jail (R. Hamm 1, 2). Rev. Ivory died during the appeal of the convictions (R. Hamm 98).

On June 7, 1960 Hamm and Rev. Ivory entered McCrory's Dime Store (R. Hamm 67, 68), a retail national chain store, open to the public at large (R. Hamm 59, 60, 61, 66, 68). After purchasing several items in the store, they decided to order coffee at the lunch counter (R. Hamm 69, 70, 76). The lunch counter is one of 20 counters in the store and is separated from the adjoining counter solely by an aisle (R. Hamm 58). Hamm seated himself on a stool, and Rev. Ivory, a cripple, remained in his wheel chair next to the counter (R. Hamm 12, 13, 28). Although Hamm and Rev. Ivory were orderly and neatly dressed (R. Hamm 20, 64, 65, 71, 72) the manager of the store,

H. C. Whiteaker, told them that "he could not serve them" (R. Hamm 63). Mr. Whiteaker, under questioning by defendant's counsel, clearly specified that the store's policy was that of not serving Negroes seated at the lunch counter (R. 59-64):

> Q. Now, I believe, is it true that you invite members of the public to come into your store? A. Yes, it is for the public.
>
> • • • • •
>
> Q. The policy of your store as manager is not to exclude anybody from coming in and buying these three thousand items on account of race, nationality or religion, is that right? A. The only place where there has been exception, where there is an exception, is at our lunch counter.
>
> • • • • •
>
> Q. I see. Now, sir, if I may ask you, what is the basis of this policy as to the lunch counter; first, I want to know as to race, religion and nationality. What is the basis of it? A. Since I have been here, which is, the restaurant has been open nine years, we have not served a Negro seated at the lunch counter (R. Hamm 59).

Negroes were welcome in all other parts of the store and could buy food to "take out" at the end of the counter (R. Hamm 60, 61). This policy of segregation at lunch counters in places of public accommodation was in conformity with the custom of the community (R. Hamm 23, 61).

> Q. Oh, I see, but generally speaking, you consider the American Negro as part of the general public, is that right, just generally speaking? A. Yes, sir.
>
> Q. You don't have any objections for him spending any amount of money he wants to on these 3,000 items

do you? A. That's up to him to spend if he wants to spend.

Q. This is a custom, as I understand it, this is a custom instead of a law that causes you not to want him to ask for service at the lunch counter? A. There is no law to my knowledge, it is merely a custom in this community (R. Hamm 61).

After the arrival of two police officers, the manager asked Hamm and Rev. Ivory to leave the lunch counter (R. Hamm 64). It is not clear whether the manager made the request with or without the prompting of the police officers (R. Hamm 71, 77). Rev. Ivory insisted upon a refund for the purchases that he had made in other parts of the store. The testimony is conflicting as to whether Rev. Ivory refused to leave or whether he merely insisted upon a refund before leaving and was arrested before the manager indicated the place for refund (R. Hamm 14, 15, 22, 29, 30, 31, 32, 71, 79).

Rev. Ivory was tried for trespass in the Recorders Court in the City of Rock Hill on June 29, 1960. The prosecuting attorney relied on three state and city "trespass" statutes, S.C. Code §16-386, S.C. Code §16-388 (2), Code City of Rock Hill §19-12, and "any other sections" (R. Hamm 7). Petitioner Hamm's case was submitted to the jury on the Ivory record (R. Hamm 1). Defendants filed timely motions raising Fourteenth Amendment due process and equal protection objections during and after the trial (R. Hamm 34-53, 80-81). The jury returned a general verdict of guilty and defendants were sentenced to pay a fine of $100 or serve 30 days in prison. On December 29, 1961 the convictions were affirmed along with several breach of the peace convictions and other trespass convictions in the Sixth Judicial Circuit Court of York County. The Court

did not specify which statute applied to the *Hamm* case, but did not distinguish the trespass charge in *Hamm's* case from a trespass charge in a case arising before enactment of the 1960 trespass law S.C. Code §16-388 (2). On December 6, 1962, the Supreme Court of South Carolina affirmed the conviction of Hamm (R. Hamm 101) on the basis of S.C. Code §16-388 (2) (1960 trespass law). That Court concluded:

> There is nothing substantial in the objection that the City Recorder refused to require the City of Rock Hill to elect the particular statute upon which the prosecution was based. The warrant charged a single offense of trespass and the Recorder submitted to the jury only the question of whether the appellant was guilty of trespass as such was defined in the statute heretofore cited. There was no prejudice to the appellant.
>
> The record shows that the appellant and the Rev. C. A. Ivory are Negroes. It was the policy of McCrory's store not to serve Negroes at its lunch counter. The appellant asserts by exceptions 3, 4 and 5 that his arrest by the police officers of the City of Rock Hill and his conviction of trespass that followed was in furtherance of an unlawful policy of racial discrimination and constituted State action in violation of his rights to due process and equal protection of the laws under the Fourteenth Amendment to the United States Constitution. Identical contention was made, considered and rejected in the cases of City of Greenville v. Peterson, et al., 239 S.C. 298, 122 S. E. 2d 826; City of Charleston v. Mitchell, et al., 239 S.C. 376, 123 S. E. (2d) 512; City of Columbia v. Barr et al., 239 S.C. 395, 123 S. E. (2d) 521, and City of Columbia v. Bouie, et al., 239 S.C. 570, 124 S. E. 2d 332, in each of which

was involved a sit-down demonstration similar to that disclosed by the uncontradicted evidence here, at a lunch counter in a place of business privately owned and operated, as was McCrory's in the case at bar (R. Hamm 105).

Rehearing was denied on January 11, 1963 (R. Hamm 106).

2. *Lupper et al.* v. *Arkansas*

Petitioners Frank James Lupper[a] and Thomas Robinson were arrested and convicted of trespass for participation in a "sit-in" demonstration in the luncheon area of the Blass Department Store in Little Rock, Arkansas.

On the afternoon of April 13, 1960, police officer Baer followed a group of Negroes, including petitioner Thomas Robinson, when he saw them entering the Blass Department Store (R. Lupper 36, 38). When he observed their seating themselves in the mezzanine luncheon area he left the store and reported his observations to police headquarters (R. Lupper 37). Two other police officers were sent by headquarters to join officer Baer (R. Lupper 37). When the three officers were across the street from the store they were approached by two store managers, whom they accompanied back to the store upon being told that "they had some colored boys" (R. Lupper 26, 27). The petitioners were found on the main floor of the department store (R. Lupper 32, 33). The managers pointed them out to the police as two of a group of five or more Negroes who had sought service in the luncheon area and failed to

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[a] The opinion of the Supreme Court of Arkansas uses the name "James Frank Lupper." The brief herein uses the name Frank James Lupper as that is petitioner's true name (R. Lupper 53).

leave after being refused service (R. Lupper 32, 33, 42, 46).[b] The officers testified they arrested petitioners after petitioners admitted they had refused to leave the luncheon area upon the manager's request (R. Lupper 29). None of the officers had seen the petitioners refuse to leave the luncheon area, and as one stated, the arrests had been made solely because the managers had asked to "get them out from the lunch counter" (R. Lupper 29, 35, 38).

The store was open to the general public[c] and the luncheon area was operating at the hour petitioners were seeking service (R. Lupper 47). One manager noted that it was his "busiest time" and he "expected a good many people" (R. Lupper 47). Negroes who sought service in the luncheon area, however, were told by the manager, "we are not prepared to serve you at this time and will you kindly excuse yourself" (R. Lupper 42). No objection was made to the demeanor of appellants as the managers testified that they were not loud, boisterous or disrespectful at any time and were "neatly dressed" (R. Lupper 42, 48).[d]

The petitioners, two Negro students at a local college, were regularly served in areas of the department store other than the luncheon area, petitioner Lupper testifying that his mother held a charge account with the store for some 19 to 20 years (R. Lupper 54, 59, 61, 62). Petitioners indicated that as they were regular customers in the store they thought they should be served in the luncheon area also (R. Lupper 54, 57, 62, 64).

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[b] Petitioner Robinson claimed he had not been told to leave, for after arriving in the mezzanine he had turned and left when he saw the other Negro youths leaving (R. Lupper 61, 64-65).

[c] In addition to trespass, petitioners were charged under the breach of the peace statute which covers only a "public place of business." Section 41-1432, Arkansas Statutes (Section 1 of Act 226 of 1959).

[d] This fact dictated reversal of petitioners' convictions of breach of the peace by the Supreme Court of Arkansas (R. Lupper 79, 81).

Petitioners were charged with breach of the peace in violation of Section 41-1432, Arkansas Statutes (Section 1 of Act 226 of 1959) and with refusal to leave a business establishment after request in violation of Section 41-1433, Arkansas Statutes (Section 1 of Act 14 of 1959).

They were tried on April 21, 1960 in the Municipal Court of Little Rock and convicted on both charges (R. Lupper 1, 2). Thereupon they appealed to the Pulaski County Circuit Court, where trial was had before a jury on June 17, 1960. Each was again convicted on both charges and each received a fine of $500.00 and 6 months' imprisonment on the Act 226 violation and a fine of $500.00 and 30 days' imprisonment on the Act 14 violation (R. Lupper 74).

Thereafter, the petitioners took an appeal to the Supreme Court of Arkansas. This appeal was consolidated for briefing with *Briggs* v. *State* (No. 4992) and *Smith* v. *State* (No. 4994) (R. Lupper 77). On May 13, 1963, the Supreme Court of Arkansas handed down its decision, reversing all the Act 226 convictions for lack of evidence and affirming the Act 14 convictions of the petitioners, holding:

> It is contended that the Act is so vague as to make it impossible to determine what conduct might transgress the statute. It is said that the Act provides no ascertainable standard of criminality. With these contentions we cannot agree. The Act clearly, specifically and definitely makes the failure to leave the business premises of another upon request of the owner or manager a misdemeanor (R. Lupper 81).
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> • • • • •
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> Appellants further assert that the Act has been unconstitutionally applied in that the enforcement of such Act amounts to "state action" in violation of the Fourteenth Amendment to the Federal Constitution. . . .

> There is no right in these defendants under either State or Federal law to compel the owners of lunch counters to serve them. Many states have enacted so-called "public accommodation" statutes but Arkansas is not among them. The Fourteenth Amendment does not guarantee any such right to the appellants (R. Lupper 84).
>
> * * * * *

The petitioners sought rehearing (R. Lupper 88-89) which was denied (R. Lupper 89-90) on June 3, 1963.

Summary of Argument

I

The Civil Rights Act of 1964, Title II (Public Accommodations), compels the reversal of these cases and their remand for dismissal, both under the doctrine expounded in *Bell* v. *Maryland*, —— U. S. ——, 12 L. Ed. 2d 822, and by virtue of §203(c) of the Civil Rights Act, forbidding "punishment" of acts such as those here shown to have been committed. By an action "possibly unique" in national legislative history, *Bell* v. *Maryland, supra*, at 829, Congress has declared it to be in the national interest that acts such as those here sought to be punished be permitted, has outlawed the interest vindicated by these prosecutions, and has expressly forbidden the punishment of persons acting as petitioners have acted. The federal and common-law doctrine of abatement of criminal prosecution, on removal of the taint of criminality, here applies, and the federal "saving statute" (1 U. S. C. §109) does not shield these prosecutions from the effect of that doctrine, for, as a matter both of its own construction and the effect on it of §203(c) of the Civil Rights Act, the "saving" statute has no application here.

Though the Court need never reach the point, it is, moreover, entirely clear, under the holding in *Bell* v. *Maryland*, *supra*, that these cases, if it were not that they must be reversed as a matter of federal law, must be remanded to the state courts for consideration there of the abating effect of the Civil Rights Act, for that Act, besides being paramount national law, is a part of the law of every state, and the position, in each state, is therefore the same as the position in Maryland as shown in *Bell*.

In the South Carolina case, the absence, in that state, of any "saving" statute, and the state's consistent adherence to the common-law rule of abatement on a legislative abolition of the crime, would make remand unnecessary, even under the erroneous assumption that state law alone applied, since South Carolina could not refuse to abate these prosecutions, in the face of the Civil Rights Act, without effecting a forbidden discrimination against a federal law.

II

These records exhibit the use of state power to effect racial discrimination, contrary to the equal protection clause of the Fourteenth Amendment.

South Carolina and Arkansas, as a matter of well-known history, have lent state power to the support of the custom of segregation. Neither state has taken any turn in regard to this question; both, for example, still retain on their statute-books extensive Jim Crow codes. The custom thus supported and given moral sanction by law is in turn expressed in the actions taken by proprietors in these cases. The causal chain is clear and visible; it is impossible that no causal connection exists between the power of the state that supports the custom of segregation, and the act of the proprietor who follows the custom. At the least, the state itself, in a criminal prosecution, cannot be heard to deny

that its own efforts to preserve segregation as a custom have been efficacious.

Further, under the doctrine of *Shelley* v. *Kraemer*, 334 U. S. 1, "state action" is found in the use of the state police, prosecutorial, and judicial powers, to implement and give sanction to racial discrimination in the extended public life of the community, even though the pattern of discrimination is nominally "private" in origin. No suggested distinction of *Shelley* is successful, and that case must either be overruled, openly or *sub silentio*, or applied here.

Thirdly, the states concerned have acted, insofar as "action" is necessary to the "denial" of "equal protection," by maintaining legal regimes in which, in final effect, a narrow and technical "property" claim is given preference to the claim of Negroes to be protected against the insult and inconvenience of public segregation.

None of these theories of "state action," broad though they are, need bring the Fourteenth Amendment into the authentically private life of man, for there are many reasonable canons of interpretation, applicable to the substantive guarantees of the Fourteenth Amendment, which may be invoked if cases arise calling for their invocation. In the cases at bar, no true private associational interest exists and the Court need not and ought not, in these cases, be concerned with the exact location of any lines which might later have to be drawn. It is enough to note that sound and equitable considerations exist on the basis of which such lines may be drawn when needful, so that the Court need not, in taking note of the plain "state action" here shown, fear a commitment to the intrusion of the Fourteenth Amendment into matters genuinely private.

III

These convictions violate due process of law, in that the statutes alleged to be violated do not forbid the conduct shown on the record, so that the convictions either (1) are without any evidence of the crime charged, or (2) are under a statute failing entirely to warn.

The statutes concerned in these cases very clearly make criminal a refusal to leave the "premises" or "place of business," *after an order to leave the "premises" or "place of business."* Both records show affirmatively, on the state's own testimony, that no such order was given; the order, in each case, was an order to move away from one part of the "premises" or "place of business." Criminal trespass statutes do not cover the whole field of civil trespass; they are special and narrow in their application. The action of disobeying an order to leave a man's house is a very different action from that of disobeying an order to move away from his piano, in a context of general welcome elsewhere in the house; the statute criminally penalizing the first cannot automatically be extended to cover the second. A statute prescribing a long jail term for refusal to leave the "place of business" or being ordered to leave the "place of business," cannot, without a violation of due process, be made the basis of conviction for refusing to stand back from the lunch counter.

In the *Hamm* case, the defendant was denied due process of law by the refusal of the prosecutor and trial judge to specify the law under which he was charged, by the consequent vagueness of the law set forth in the instructions to the jury, and by the variance between the law charged the jury and the law on the basis of which the state appellate courts sustained defendant's conviction.

ARGUMENT

I.

The Enactment of the Civil Rights Act of 1964, Subsequent to These Convictions But While They Were Still Under Direct Review, Makes Necessary Either Their Outright Reversal or a Remand to the State Courts for Consideration of That Act.

A. *The Civil Rights Act of 1964 Abates These Prosecutions as a Matter of Federal Law, and These Cases Should Be Reversed on That Ground.*

On July 2, 1964, the federal Civil Rights Act of 1964, 78 Stat. 241, went into effect, providing, *inter alia*:

> TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION.
>
> SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action: . . .
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> • • •
>
> (2) any restaurant, cafeteria, lunchroom, *lunch counter*, soda fountain, or other facility principally engaged in selling food for consumption on the premises, *including, but not limited to, any such facility*

located on the premises of any retail establishment; or any gasoline station; . . .

• • •

(4) Any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), *it serves or offers to serve interstate travelers or a substantial portion of the food which it serves,* or gasoline or other products which it sells, *has moved in commerce;* . . . and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. . . .

Sec. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Sec. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured

> by section 201 or 202; or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, *or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.* [Emphasis added.]

It is clear that department store lunch counters, such as those involved in these cases, fall within the terms of §201(c)(2), as quoted.[1] The discrimination practiced in these cases was, on the records, racial (R. Hamm 72-3 *et passim*. R. Lupper 27, 35, 36, 46, 50-51). Had these al-

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[1] The retail store lunch counters involved in these cases are literally covered by the Act, for, being open to the general public (R. Hamm 59-61, 66, 68; R. Lupper 47, 79), they "offer to serve interstate travelers . . ." §201 (b)(2), (c)(2). This statutory language contains no requirement of "substantiality," if that term could have any meaning in this context. The Bill, as originally introduced in the House by Congressman Celler as H.R. 7152, did contain such a limiting requirement in Sec. 202 (a)(3):

> . . . (i) the goods, services, facilities, privileges, advantages, or accommodations offered by any such place or establishment are provided to a substantial degree to interstate travelers . . . *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., ser. 4, pt. 1, at 653 (1963).

This section of the act was changed to its present broader form after passing through the full House Judiciary Committee. *Minority Report*, H.R. Rep. No. 914, 88th Cong., 1st Sess. 79 (1963). The omission of a requirement of "substantiality" cannot have been inadvertent, for there stands in immediate contiguity the criterion, in the alternative, that a "substantial portion" of the food served has moved in interstate commerce. "Offering to serve" interstate travelers, as an *alternative* ground to actually serving them, could hardly contain a "substantiality" requirement. It is virtually impossible that an establishment which makes a principal or massive appeal to interstate travelers would never serve one. Yet, if some "substantiality" requirement be read into the "offer to serve" criterion, that establishment would be the only one brought within the Act independently by the "offer to serve" test. Congress, in adding this language and eliminating the "substan-

leged offenses occurred after its passage, therefore, the Civil Rights Act would furnish a complete defense, not only because it is unthinkable that a state should be permitted to punish disobedience to an order the giving of

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tiality" requirement, can hardly have meant to designate a class that would be as good as empty.

This literal interpretation harmonizes completely with other portions of the coverage section, for Congress obviously intended to include virtually all hotels, gas stations, and places of amusement, especially motion picture houses. Congressman Celler's remarks, in presenting the bill, state an intent to do, for the nation as a whole, exactly what was done before in the 30 states having public accommodation laws 110 Cong. Rec. 1456 (daily ed. Jan. 31, 1964). He also spoke of the coverage of retail store lunch counters in terms indicating that their simply being "public" was enough. *Id.* p. 1457.

This construction is eminently reasonable. It is the aggregate rather than the individual effect of the prohibited practice that counts. *Wickard* v. *Filburn*, 317 U. S. 111, 127, 128; *NLRB* v. *Fainblatt*, 306 U. S. 601, 606, 607; *United States* v. *Darby*, 312 U. S. 100, 123; and it cannot be doubted that, if every restaurant not principally or largely catering to interstate travelers were segregated, the aggregate effect of the segregation of these thousands of restaurants would substantially inconvenience interstate travel. The Negro interstate traveler would still be a second-class interstate traveler, who could be confident of service only if he kept blinders on and never left the principal routes of travel to see the sights, to shop between trains, or to make any other of the departures travelers customarily make from the shortest way.

What Congress seems to have done is to cover every lunch counter that brings itself within the constitutional power of Congress by virtue of its making any kind of an offer to serve a public that includes interstate travelers, while leaving it open that some genuinely eccentric case may present itself and be found outside of the Act (cf. The "intrastate colored" lavatories that briefly flourished a few years ago in railroad stations). *NLRB* v. *Fainblatt*, *supra*, at p. 607. That this is the right construction of the phrase in question is conclusively shown by the fact that the provision would be virtually impossible to administer without it; a requirement that every Negro desiring a meal face an argument about (and finally the necessity of making an elaborate record on) the degree and quality of an offer to serve interstate travelers, would as good as nullify the Act. Particularly is this true of the use of the Act as a defense in criminal prosecutions, a use whose contemplation by Congress is proved with rare clarity by the legislative history. See text, *infra*, pp. 22, 23.

which contravenes a federal right, but because such punishment is itself explicitly declared unlawful, in §203 (c), *supra*. Senator Humphrey, floor manager for the bill in the Senate, read into the record a Justice Department statement containing this language:

> It need hardly be added, however, that nothing in section 205 (b) [now §207 (b), making the "remedies" of the Act exclusive] precludes a defendant in a State criminal trespass prosecution arising from a "sit in" at a covered establishment from asserting the nondiscrimination requirements of title II as a defense to the criminal charge. The reference in section 205 (b) to "means of enforcing" the right created by title II obviously does not deal at all with the question of whether the right created by that title may be used as a defense in criminal proceedings. Raising a defense in a criminal case is not "enforcing" a right by a "remedy" within the meaning of section 205 (b). That section is intended to preclude only direct affirmative action by the Government, or by a person aggrieved acting as a plaintiff, pursuant to Federal laws other than the provisions contained in title II. It is not intended and should not be read as precluding a plea in a criminal prosecution, or an action for damages, against a person availing himself of the Federal right created by title II, that the criminal or civil action against him is not well taken. That this is the proper connotation of the title is made doubly clear by section 203 (c) which prohibits the imposition of punishment upon any person "for exercising or attempting to exercise any right or privilege" secured by section 201 or 202. This plainly means that a defendant in a criminal trespass, breach of the peace, or other similar case can assert the rights created by 201 and 202 and that State

> courts must entertain defenses grounded upon these provisions. . . . 110 Cong. Rec. 9162-3 (daily ed. May 1, 1964).

In effect, the "offense" with which petitioners are charged is now removed, by the paramount federal authority, from the category of punishable crimes—exactly the thing that happened with respect to the Maryland "offense," when that state passed the public accommodations law that was the basis of the action taken by this Court in *Bell* v. *Maryland*, —— U. S. ——, 12 L. Ed. 2d 822, except that the Civil Rights Act is stronger, since it contains that §203 (c) quoted in the preceding statement proffered by Senator Humphrey, and directly forbidding "punishment" for an attempt at exercising the named rights.

If these petitioners are now to be punished notwithstanding §203 (c), it will be for having insisted upon something which the national conscience has now most decidedly declared they are entitled to insist upon, against a refusal which the national conscience has now declared affirmatively unlawful. Their punishment can serve no purpose, for no valid state or private interest can now be admitted to exist in deterring them or others from doing what they have done; the only licit deterrence interest now runs the other way. Their punishment would afford the immoral spectacle of pointless revenge against those whose claim, substantially, has been validated by national authority. Such a result ought to be allowed only if the law unequivocally commands it. It is petitioners' submission that the law actually forbids it—that the Civil Rights Act of 1964 and especially its §203 (c), placed in the setting of the ancient law expounded in this Court's opinion in *Bell* v. *Maryland*, *supra*, abates these prosecutions and forces their remand for dismissal.

Not only the text but all the implications and radiations of the Civil Rights Act are a part of federal law, overriding contradictory state law to their full extent. *Gibbons* v. *Ogden*, 22 U. S. (9 Wheaton) 1; *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U. S. 173; *Sperry* v. *Florida*, 373 U. S. 379. In the *Sola* case, this Court said, at p. 176:

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296; *Prudence Corp.* v. *Geist*, 316 U. S. 89, 95; *Board of Comm's* v. *United States*, 308 U. S. 343, 349-50; cf. *O'Brien* v. *Western Union Telegraph Co.*, 113 F. 2d 539, 541. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2; *Awolin* v. *Atlas Exchange Bank*, 295 U. S. 209; *Deitrick* v. *Greaney*, 309 U. S. 190, 200-01.

This Court, in fitting the statute into the complex web of federal-state relations, must follow the method set out

in *San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36* v. *Garmon*, 359 U. S. 236, 239, 240:

> The comprehensive regulation of industrial relations by Congress, novel federal legislation twenty-five years ago but now an integral part of our economic life, inevitably gave rise to difficult problems of federal-state relations. To be sure, in the abstract these problems came to us as ordinary questions of statutory construction. But they involved a more complicated and perceptive process than is conveyed by the delusive phrase, "ascertaining the intent of the legislature." Many of these problems probably could not have been, at all events were not, foreseen by the Congress. Others were only dimly perceived and their precise scope only vaguely defined. This Court was called upon to apply a new and complicated legislative scheme, the size and social policy of which were drawn with broad strokes while the details had to be filled in, to no small extent, by the judicial process.

(Cf. *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, 351.) The classic doctrines of the two preceding quotations are exactly applicable to the question of the abative effect of the Civil Rights Act of 1964 on these prosecutions.

Apart from statute, the general federal rule is that a change in the law, prospectively rendering that conduct innocent which was formerly criminal, abates prosecution on charges of having violated the no longer existent law. See *Bell* v. *Maryland*, *supra*, 12 L. Ed. 2d at p. 826, n. 2; *United States* v. *Chambers*, 291 U. S. 217; *United States* v. *Tynen*, 78 U. S. (11 Wall.) 88.

Though the case has apparently never arisen, there would seem to be no reason for the non-application of this rule

to the operation of a federal statute upon state prosecutions, where the federal statute has the effect (as the Civil Rights Act of 1964 has with respect to these prosecutions) of rendering lawful, in the name of the national authority and interest, that which formerly was unlawful, and rendering unlawful the actions and claims of the person whose interests are protected by the state's prosecution, cf. *Bell* v. *Maryland*, —— U. S. at ——, 12 L. Ed. 2d at 825. Indeed, the case is *a fortiori*, for the national authority is supreme.

Unless, therefore, there is statutory warrant for the contrary conclusion, the effect of the Civil Rights Act of 1964, in its Sections 201 ff., must be to abate these prosecutions.

The only relevant statutory provision is the first sentence of the Act of February 25, 1871, R.S. 13, now codified in 1 U. S. C. §109, in the following terms:

> §109. Repeal of statutes as affecting existing liabilities.
>
> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

Both as a matter of its own construction and because of the existence of §203(c) of the Civil Rights Act, this statute does not apply here. To it, first, may be directed, with even stronger force, the remarks of this Court on the similar Maryland statute, in *Bell* v. *Maryland, supra,* 12 L. Ed. 2d at pp. 828, 829:

> By its terms the clause does not appear to be applicable at all to the present situation. It applies only to the "repeal," "repeal and re-enactment," "revision," "amendment," or "consolidation" of any statute or part thereof. The effect wrought upon the criminal trespass statute by the supervening public accommodations laws would seem to be properly described by none of these terms. The only two that could even arguably apply are "repeal" and "amendment." But neither the city nor the state public accommodations enactment gives the slightest indication that the legislature considered itself to be "repealing" or "amending" the trespass law. Neither enactment refers in any way to the trespass law, as is characteristically done when a prior statute is being repealed or amended. This fact alone raises a substantial possibility that the saving clause would be held inapplicable, for the clause might be narrowly construed—especially since it is in derogation of the common law and since this is a criminal case—as requiring that a "repeal" or "amendment" be designated as such in the supervening statute itself.
>
> The absence of such terms from the public accommodations laws becomes more significant when it is recognized that the effect of these enactments upon the trespass statute was quite different from that of an "amendment" or even a "repeal" in the usual sense. These enactments do not—in the manner of an ordinary "repeal," even one that is substantive rather than only formal or technical—merely erase the criminal liability

> that had formerly attached to persons who entered or crossed over the premises of a restaurant after being notified not to because of their race; they go further and confer upon such persons an affirmative right to carry on such conduct, making it unlawful for the restaurant owner or proprietor to notify them to leave because of their race. Such a substitution of a right for a crime, and vice versa, is a possibly unique phenomenon in legislation; it thus might well be construed as falling outside the routine categories of "amendment" and "repeal."

Of the two words here discussed, "amend" and "repeal," "amend" is the more nearly apt to describe the effect of the Civil Rights Act on the trespass laws of the states, though neither exactly answers, see *Bell* v. *Maryland, supra,* 12 L. Ed. 2d at pp. 828, 829. But the federal "saving clause," by its own terms, saves rights under the prior statute only when "repeal" has taken place. While some lower federal courts have held "amendment" tantamount to "repeal," in applying this statute, e.g. *United States* v. *Taylor,* 123 F. Supp. 920 (S. D. N. Y. 1954), this Court has never so held. On the other hand, the literal force of "repeal," was insisted on, in another context, in *Moore* v. *United States,* 85 Fed. 465 (8th Cir. 1898). The word "repeal" cannot, in any case, be stretched to cover the total reversal of law and policy which The Civil Rights Act has effected on the permissible applications of generally valid state trespass statutes. What has happened is not "repeal" but the affirmative utterance of an overriding national judgment, practical and moral, removing all taint from actions such as petitioners', and declaring it to be a national wrong to deny them service *or to "punish" them for seeking service.* This is a "possibly unique phenomenon in [federal] legislation;" see *Bell* v. *Maryland, supra,* 12 L. Ed. 2d at p. 829.

It is further, certain that the word "statute," three times used in the here relevant first sentence of 1 U. S. C. §109, to denote the prior law that is "saved," does not refer to state enactments at all. This section now stands, and since its enactment in 1871 always has stood, in a context dealing entirely with federal enactments.[2] There exists, moreover, a sound policy reason for this limitation; it is one Congress might sensibly have wished to make. For where criminal liabilities are saved, the federal prosecutor, an officer responsible ultimately to national authority, can use his discretion to prevent a harsh application. If state criminal liabilities were saved, in the face of a national determination that the acts on which they rest ought not to be criminal, no such tempering of the rule, by any official responsible to the nation as a whole, would be possible. National executive clemency would likewise be foreclosed.

An entirely independent and most compelling reason exists for denying 1 U. S. C. §109 any application to the

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[2] The 1871 legislative history of the act from which 1 U. S. C. §109 descends is wholly silent on this provision, except for a single recitation of its content, without exegesis or comment. See Million, *Expiration or Repeal of a Federal or Oregon Statute as a Bar to Prosecution for Violations Thereunder*. 24 Ore. L. Rev. 25, 31, 32 (1944). But the context of the discussion makes it plain that only federal statutes were in Congress' mind. The enactment was part of an Act "Prescribing the form of the enacting and resolving clauses of the acts and resolutions of Congress, and rules for the construction thereof." The other sections of the Act, three in number, deal with form of enacting clauses, routine rules of construction, and non-revival of repealed statutes by repeal of the repealing Act. (Now 1 U. S. C. §§1 (in part), 101-104, and 108.) The discussion touched on these sections, rather than on the one here of interest. Cong. Globe, 41st Cong., 2d Sess. 2464 (1870); *Id.*, 3rd Sess. 775 (1871). The Forty-First Congress, with Mr. Conkling's voice so strong in this and other debates, was not one to which it is reasonable to attribute a latent tenderness to states' rights. On the whole record of these debates, it is entirely plain that the application of the saving provision to state law was never thought of, and that the whole focus of interest was the internal characteristics of Acts of Congress, and their mutual relations.

present cases. That statute itself provides that the "penalty" shall be "extinguished" if the repealing act "so expressly provide. . . . " The Civil Rights Act of 1964, in its Section 203, as seen above, forbids not only the withholding of service at places of public accommodation, not only the intimidation and coercion of persons seeking such service, but also [§203(c)] *punishing* or *attempting to punish* "any person for exercising or attempting to exercise any right or privilege *secured* by section 201 or 202." [Emphasis added.] The present prosecutions would clearly fall under this law, if the acts on which they are based had taken place after July 2, 1964. They fall under the law, anyway, if the word "secure" be taken in one of its normal dictionary meanings (soundly rooted in its etymology and exemplified in the last words of the Preamble to the Constitution of the United States), "to put beyond the hazard of losing or of not receiving." *Webster's New International Dictionary*, 2d ed., s.v. "secure"; "To render safe, protect or shelter from, guard *against* some particular danger . . . To make secure or certain . . . " *New English Dictionary*, s.v. "secure." "Secure" is not an apt synonym for "create," a synonym necessary for referring §203(c) solely to the period after July 2, 1964. It is an apt word for "making safe that which already or independently exists," and that interpretation results in the literal applicability of §203(c) to these prosecutions.

The House Committee Report on the Civil Rights Act, H. R. Report No. 914, 88th Cong., 1st Sess. (1963), contains passages that corroborate the judgment that Congress, in considering the public accommodations title of the bill, was thinking not only in terms of "rights" to be *created* by it, but of "rights" already existent, at the very least on the moral plane, which were to be "*secured*" by it. The Report at p. 18 says, for example, that:

> . . . Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens.

In the next paragraph, it is added:

> . . . A number of provisions of the Constitution of the United States clearly supply the means to "secure these rights," and H. R. 7152, as amended, resting upon this authority, is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope.

That this language refers, among other things, to the public accommodations problem is made clear on the same page, where it is said of the bill:

> . . . It would make it possible to remove the daily affront and humiliation involved in discriminatory denials of access to facilities ostensibly open to the general public . . .

This application is also suggested by specific statement in the part of the Report at p. 20 dealing with public accommodations:

> Section 201 (a) *declares* the basic right to equal access to places of public accommodation, as defined, without discrimination or segregation on the ground of race, color, religion, or national origin. [Emphasis added.]

In the Senate, a textual change, highly significant here, took place when, in §207(b), the phrase "based on this title" was substituted for "hereby created," in application

to the rights to public accommodation. Senator Miller of Iowa, explaining, said:

> One can get into a jurisprudential argument as to whether the title creates rights. *Many believe that the title does not, but that the rights are created by the Constitution.* [Emphasis added.] 110 Cong. Rec. 12999 (daily ed. June 11, 1964).

These passages make it plain that the Act was passed in an atmosphere in which the "right" to non-discrimination was conceived of, at least in part, as something that existed before the bill, something that was recognized, declared, and protected, rather than being created, by the bill. It is not necessary, and would probably be impossible, to ascertain just how, in every context, this conception of "right" functioned with other conceptions, or how it may finally be fitted into the Act in all its parts. It suffices to show, and the quoted passages do show, that there is nothing unnatural in a construction of §203(c) to apply to the punishment or attempted punishment of the claim of the right to be free from discrimination, the same right "secured" and specially implemented by the law, but conceived of as existing, at least morally, prior to its passage. On this view, §203(c) is tantamount to a specific shield against the force of 1 U. S. C. §109, even if that section would have applied in the absence of §203(c).

It is entirely plain that at least some of the "rights" "secured" by Title II of the Civil Rights Act were necessarily conceived as preexisting the Act, as a matter of strictest law, for Title II proscribes discrimination supported by "state action" [§201(a) and (b)]. It is not controversial that such discrimination was unlawful before the Act. Moreover, among the forms of "state action" said by the Act to infect discrimination with illegality is state

"enforcement" of "custom" (§201(d)(2))—terminology seemingly applicable to the very cases at bar (see Points IIA and IIB, *infra*, pp. 46-57). In §203(c), Congress lumps together all these "rights" without the slightest suggestion of there being intended any distinction between them, with respect to the present lawfulness of "punishing" their assertion, whenever that assertion took place. It can hardly be believed that Congress would have wished to present this Court with the task of unravelling and disentangling those "rights" which did and those which in some strict sense did not antedate the Act, merely for the purpose of disposing of residual prosecutions for actions now approved. It is much more reasonable to think that Congress meant to forbid "punishment" of all actions descriptively similar to those now shielded by the Act.

In addition to the assistance of the federal common law, we are aided in the construction of §203(c) and 1 U. S. C. §109 by the framework of federal constitutional law. The Fourteenth Amendment guarantees of equal protection of the laws and due process of law forbid the infliction of penalties on a discriminatory basis. The action taken by Congress under the fifth section of that Amendment in enacting the Civil Rights Act of 1964 places petitioners in a different juxtaposition to the States today than at the time that these cases were affirmed in the Supreme Courts of the states. At that time, consideration of the prohibitions of the Fourteenth Amendment involved petitioners' claim to freedom from state police and judicial enforcement of racial discrimination as a counterpoise to the restaurateurs' claim to the use of the States' police and judicial machinery in the protection of his private property. Today, there is nothing left to balance against the first of these claims. The claims and interests of the restaurateur to racially discriminate in the use of his private property can no longer receive the protection of law; moreover, conduct

by the restaurateur in furtherance of such claims is condemned by law.

Affirmance of these convictions and the subsequent punishment of these petitioners would stand alone as a last vestige of state activity in furtherance of racial discrimination. No longer can the state be heard to say that petitioners' release could be grounded only on a non-existent right to service at lunch counters; that right exists. No longer can the state insist that release of petitioners is an abandonment of the rule of law to the rule of self-help; the rule of law today forbids the restaurateur self-help in furtherance of racial discrimination. Finally, the state today cannot maintain that the release of petitioners abandons the right of the restaurateur to use his property in a discriminatory way; the restaurateur does not have that right.

Also, the power of Congress over interstate commerce, and the functioning of this Court in judging upon burdens placed on that commerce by the states, are hereby complexly involved. In part, the establishments covered by the act are defined at those "affecting commerce." *Serving or offering to serve interstate travelers* is one of the defining criteria, §201(c)(2). Congress' decision to put this law into effect must therefore have rested, in part, on the judgment that racial discrimination, in establishments offering to serve interstate travelers, constituted an undesirable burden on that commerce. But if that be the fact found by Congress, it must have been found by Congress to be the fact as well before as after the passage of the bill. Congress could not have passed this section without having made the judgment that the very practices which were here lent the extreme sanction of the criminal law were deleterious to the national interest, even before the Act was passed. It is not necessary to urge that this consideration

alone would justify this Court in striking down these convictions as transgressing the implications of the Commerce Clause, though the aid of a judgment by Congress on such a question is most considerable. Rather, the questions of construction are illuminated. To deny 1 U. S. C. §109 an unnatural and unanticipated application here only results in allowing this practical judgment by Congress to be fully effective as to the times respecting which it was actually made. To interpret §203(c) as petitioners urge produces the same result.

These considerations are necessarily technical, since they concern the construction of words. But they are not harmfully technical in view of the context in which they arise. The result of their rejection would be that many people suffer terms of imprisonment for peaceably claiming rights which Congress has now, overwhelmingly, in one of the great legislative enactments of our history, declared it to be in the national interest to "secure" against invasion.

The objective of avoiding this anomaly would be not a worthy ground for reversing these convictions, were the legal underpinning unsound. It is submitted that it is sound. In the absence of statute, the effect of an Act of Congress, making innocent that which was a crime, is to abate prosecution and shield against punishment. It would be incompatible with the Supremacy Clause to attribute any less effect than that to a federal Act which wipes out the criminality of an action made criminal by one of the states, for a federal law functions in a dual capacity, as a supreme law of the nation and as a part of the law of every state. *Hauenstein* v. *Lynham*, 100 U. S. 483. The only statute in question, 1 U. S. C. §109, can be construed to prevent this salutary effect only by stretching the word "repeal" to cover something quite outside the customary meaning of that term, and only by taking the word "statute," in a context dealing with federal enactments only, to

refer to the laws of the state. If either of these constructions is wrong—and it is submitted both are wrong—then 1 U. S. C. §109 has no application. If §203(c) of the Act be interpreted to mean all it seems to mean, then 1 U. S. C. §109, by its own affirmative terms, does not apply and, indeed, could not apply against a later Act of Congress. On any of these three grounds, no statutory bar prevents the application of the settled non-statutory rule, and these prosecutions must be abated, in accordance with that rule. As this Court said in *Bell* v. *Maryland*, —— U. S. at ——, 12 L. Ed. 2d at 829:

> The legislative policy embodied in the supervening enactments here would appear to be much more strongly opposed to that embodied in the old enactment than is usually true in the case of an "amendment" or "repeal." It would consequently seem unlikely that the legislature intended the saving clause to apply in this situation, where the result of its application would be the conviction and punishment of persons whose "crime" has been not only erased from the statute books but officially vindicated by the new enactments. A legislature that passes a public accommodations law making it unlawful to deny services on account of race probably did not desire that persons should still be prosecuted and punished for the "crime" of seeking service from a place of public accommodations which denies it on account of race. Since the language of the saving clause raises no barrier to a ruling in accordance with these policy considerations, we should hesitate long indeed before concluding that the Maryland Court of Appeals would definitely hold the saving clause applicable to save these convictions.

This Court should hesitate even longer before concluding, within the area of its own responsibility that, where

the language of the federal saving clause raises no barrier, where its key words "repeal" and "statute" must be lavishly extended to apply, where the non-statutory rule is clear, where the new statute explicitly forbids "punishment," and where the policy considerations are national in scope and prime in national importance, these petitioners may now be jailed for having done what Congress has, after dramatic struggle and overwhelming national decision, said that it is in the national interest they be allowed to do.

This application of the Civil Rights Act is not "retroactive"; this is clearly shown by the reference above to §203(c), with its prohibition of "punishment". It is the *punishment* of these petitioners, in the future, that would be interdicted, not on the ground (so far as the present Point is concerned) that their acts were lawful when performed, or even that their convictions were unlawful when had, but on the well settled ground that punishment is inappropriate, and violates the present conscience of the relevant political society, when the legislative authority that has the power to do so declares that the taint of criminality ought to be removed from acts previously infected with it. It would not be out of place to quote the South Carolina court's powerful statement of the reasons for this rule:

> The reason of the law is obvious; it is not only unwise and impolitic, but it is unjust to punish a man for the commission of an act which the law no longer considers as an offence. The policy of a country may require the prohibition of certain acts, or the performance of certain duties for a time, after which the acts may be innocent, and the duties not required. It would not be less absurd to punish a man for an act which is not illegal at the time the punishment is inflicted, than to punish him for one which never has been declared illegal; and upon an examination of the authori-

ties relied on by the counsel for the appellant, it will be found, that they are all embraced within this doctrine. *State* v. *Cole*, 2 McCord 1, 2, 3 (S. C. 1822).

The nature of the statutes concerned here makes these cases fit the reason of the rule with a singular aptness. The petitioners, if freed by operation of this rule, would be the beneficiaries of no subtle gap in the seisin of the law, no merely technical "repeal" by dubious implication, no lapse or expiration through inadvertence. What they did would not have been criminal at all, in the states concerned, before 1959 or 1960, or could be made so only by a construction of prior state law so bizarre as to violate due process. *Barr* v. *Columbia*, —— U. S. ——, 12 L. Ed. 2d 766. In 1959 and 1960 respectively, Arkansas and South Carolina made this conduct criminal (waiving for present purposes the problems of construction and application in the amending statutes of these years, see Point III, *infra*). Then Congress, the legislative authority with power to do it, squarely and in the amplest equity made these acts noncriminal, made their punishment unlawful, and made unlawful the very request to leave on disobedience to which the prosecutions were based. The conscience of the United States, by overwhelming consensus in both Houses of Congress, and by the approval of the President, has said that it is wrong and against the national interest for acts such as these to be punished. There never was a clearer case for the application of the common-law principle of abatement on change in the law; there never was a less appealing case for the stretched construction of a "saving" statute. If the convictions as well as the Civil Rights Act had been federal, and if 1 U. S. C. §109 had been applied, it is extremely unlikely that prosecutor's discretion or executive clemency would have left people to suffer who had been convicted of "offenses" now virtually declared by

Congress to be meritorious, certainly blameless. As matters stand, neither federal prosecutor's discretion nor federal executive clemency can help these petitioners. But they can be helped by the application of the settled rule adverted to in *Bell* v. *Maryland, supra*, 12 L. Ed. 2d at p. 826, and by a natural construction of §203(c).

No vested private rights or even expectations make inappropriate the application to petitioners' cases of the common-law rule. This is therefore, in relevant respects, a stronger case than *Louisville and Nashville R.R. Co.* v. *Mottley*, 211 U. S. 149. In that case, a contract between the railroad and the Mottleys had created a vested contract right, perfect under state law, and arising out of operative facts long antedating any federal statutory expression of policy such as to make obnoxious to a federal interest the enforcement of the contract. Yet this Court held that the enforcement of the contract violated federal law, and revised a state court judgment ordering specific performance.

A striking parallel is found in the dealings of the Courts of Appeals of the Second and Ninth Circuits with the problem of pseudo-retroactivity, in cases under the Wagner Act. The employer has been held guilty of an unfair labor practice when he refused to reinstate employees whom he had discharged during a strike prior to the effective date of the Act. *Phelps Dodge* v. *NLRB*, 113 F. 2d 202 (2d Cir. 1940), *modified and remanded on other grounds*, 313 U. S. 177 (1941); *NLRB* v. *Carlisle Lumber*, 94 F. 2d 138 (9th Cir. 1937), cert. den. 304 U. S. 575 (1938), cert. den. 306 U. S. 646 (1939). In effect, these courts held that punishment, for activities before the Act in time but favored and fostered by the Act, was forbidden, though the language of the Wagner Act was less literally applicable than the "punishment" language of §203(c) of the Civil Rights Act. Employers were forbidden to "interfere with, restrain, or coerce employees in the exercise of rights *guaranteed* in

Section 7 . . ." and ". . . by discrimination in regard to hire and tenure . . . to encourage or discourage membership in any labor organization. National Labor Relations Act (Wagner-Connery Act) §8(a)(1) and (a)(3), 49 Stat. 452 (1935), 29 U. S. C. §158(a)(1) and (a)(3). If the policy of the Wagner-Connery Act, without a specific ban on "punishment," could reach far enough to force the resumption of a terminated relationship, on the ground that, though the termination was lawful when accomplished, nonreinstatement countervailed the Act, surely it is unallowable that imprisonment be suffered now for activities Congress has so decisively approved. As these Wagner-Connery cases show, this result could be attained without the specific "punishment" language of §203(c), but that language hammers the point home clearly, and also makes clear the applicability of this principle to the states, the entities as to which the concept of "punishment" is most relevant. Cf. *United States* v. *California*, 297 U. S. 175.

There is no legitimate state interest, of a public nature, in punishing these petitioners, now that the Civil Rights Act is in force. The deterrence of petitioners, and others, from insisting on service, as against the wishes of the proprietors to practice racial discrimination, is now an illegitimate object, directly contravening federal law and policy. There is no legitimate private interest left, to be indirectly protected, for the federal law now explicitly forbids the selection of clientele on a racial basis.

Finally, petitioners remind the Court that the views here urged have not to do with a constitutional rule, binding on Congress in the future. To these cases as to the case of *Bell* v. *Maryland* may be applied, with the substitution of the words "unlawful act" for "crime", the words of the Court in that case: "Such a substitution of a right for a crime, and vice versa, is a possibly unique phenomenon in

legislation . . ." —— U. S. at pp. ——, 12 L. Ed. 2d at pp. 828, 829. But if Congress anticipates its recurrence, and desires to prevent the effect of abatement of state prosecutions where its own authority has made non-criminal the conduct on which they rest, this can freely be done, either by a special saving clause in a particular statute, or by an amendment to the general saving clause, 1 U. S. C. §109. It is not for this Court now to fill this gap by a very strict construction of the Civil Rights Act and a very large and liberal construction of an 1871 general saving clause statute that was clearly passed with no such problem as this in mind, and with no view to adjusting the relations between state and federal law. Without such construction, the Civil Rights Act, under the common-law rule, abates these prosecutions and they ought to be remanded for dismissal.

These cases might, it is true, be remanded to the state courts for consideration even of the federal question here raised. But petitioners submit that such an action would be one of only specious comity. The question argued in the foregoing point is one of uniform national importance; very many pending cases, in a number of states and at various stages of procedure, hang on its resolution. The truly helpful action to the states would be a clearcut determination at this time by the court to which the question will ultimately have to come.

B. *The Least Possible Consequence in These Cases, of the Rule Announced in* Bell v. Maryland *Is Their Remand to the State Courts, for Consideration There of the Effect of the Enactment of the Federal Civil Rights Act of 1964.*

In *Bell* v. *Maryland*, —— U. S. ——, 12 L. Ed. 2d 822, decided at the last term of this Court, it was held that the enactment of a state public accommodations law, subsequent to the commission of the alleged offenses but while

the convictions were still under review, made appropriate a remand to the state courts, for consideration of the question whether, within the framework of the state common and statutory law, such intervening enactment destroyed the legal basis for prosecution and made dismissal appropriate. This action was taken by this Court after careful consideration both of the general common law rule and of the Maryland general "saving clause," 1 Md. Code §3 (1957), see *Bell* v. *Maryland*, *supra*, 12 L. Ed. 2d at pp. 826-828, 831, 832.

The federal Civil Rights Act besides being a permanent federal law, is a part of the law of each state.

> It must always be borne in mind that the Constitution, laws and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity. See, also Shanks v. Dupont, 3 Pet., 242; Foster v. Neilson, 2 Pet., 253; Cherokee Tobacco, 11 Wall., 616; Mr. Pinkney's Speech, 3 Elliot's Const. Deb. 231; People v. Gerke, 5 Cal., 381. (*Hauenstein* v. *Lynham*, 100 U. S. 483, 490.)

For the narrower application of the *Bell* holding the position, therefore, must be taken to be the same as it would be if Arkansas and South Carolina had, while these prosecutions were pending, enacted laws exactly equivalent, in tenor and effect, to the federal Civil Rights Act.

Arkansas has a general "saving clause" statute, Ark. Stats., 1947, §1-103:

> 1-103. Repeal of criminal or penal statute—Effect on Offenses Comitted.—When any criminal or penal statute shall be repealed, all offenses committed or for-

feitures accrued under it while it was in force shall be punished or enforced as if it were in force, and notwithstanding such repeal, unless otherwise expressly provided in the repealing statute. [Act Dec. 21, 1846, §1, p. 93; C. & M. Dig., §9758; Pope's Dig., §13283.]

The application of this statute to the saving of these prosecutions is even more dubious than that of the Maryland statute, *Maryland* v. *Bell*, *supra*, for the Arkansas statute speaks only of "repeal", where the Maryland statute speaks of "amendment" as well, see *Bell* v. *Maryland*, *supra*, —— U. S. at p. ——, 12 L. Ed. 2d 822 at pp. 828-9 (quoted *supra* herein at pp. 27, 28), and the operation of a public accommodations statute, forbidding racial discrimination, upon a general trespass law, more nearly resembles "amendment" than "repeal," though (as the Court points out in *Bell*) neither word may be apt.

The same remarks apply to Ark. Stats., §1-104:

1-104. Existing actions not affected by repeal.—No action, plea, prosecution or proceeding, civil or criminal, pending at the time any statutory provision shall be repealed, shall be affected by such repeal, but the same shall proceed in all respects as if such statutory provision had not been repealed, (except that all proceedings had after the taking effect of the revised statutes, shall be conducted according to the provisions of such statutes, and shall be in all respects, subject to the provisions thereof, so far as they are applicable). [Rev. Stat., ch. 129, §31; C. & M. Dig., §9759; Pope's Dig., §13284.]

South Carolina has no general "saving clause," and applies the common-law rule, *State* v. *Moore*, 128 S. C. 192, 122 S. E. 672 (1924); see Point I-C, *infra* for fuller discussion of the position in that state.

As to both these states, and as to both these pending Civil Rights Act is to be taken to be solely a state-law cases, therefore (even on the assumption, which is contrary to fact, see Point I-A *supra*, that the abating effect of the question), the least effect of *Bell* must be reversal and remand for consideration of the question whether the Civil Rights Act, in its section quoted above, has the effect of abating these prosecutions.

C. *In the Case of* Hamm v. City of Rock Hill, *This Court Might Finally Reverse, on the Ground That, Since South Carolina Has No "Saving" Statute and Follows the Common Law Rule, Any Determination by the Courts of That State That This Prosecution Is Not Abated Would Be So Out of Line With Its Prior Law as to Constitute a Discrimination Against a Federally Originated Right.*

South Carolina, as pointed out above, differs from most American states in that it has no statute modifying the universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a criminal proceeding charging such conduct." *Bell* v. *Maryland*, *supra*, — U. S. at p. —, 12 L. Ed. 2d at 826.

Obedient to this principle, South Carolina has never, so far as can be discovered, sustained criminal punishment of an act no longer criminal when the punishment was to be inflicted. This principle has been applied not only to cases of total "repeal" but also to cases of modification of the nature and elements of criminality. *State* v. *Moore*, 128 S. C. 192, 122 S. E. 672 (1924), was a case of prosecution for giving a check without funds to cover, under a statute in which fraud was not an element. An intervening statu-

For the South Carolina court's early and powerful statement of [illegible]

added the requirement of fraud, and the conviction was reversed.

No South Carolina case has been found that could cast doubt on the proposition that as a matter of the standing law of that state, the passage by its legislature, on July 2, 1964, of a law in the same terms as the federal Civil Rights Act, must result in the reversal of these convictions and the dismissal of the cases. Clearly, South Carolina must give just that effect to the federal Act. *Hauenstein* v. *Lynham*, 100 U. S. 483. Her failure to do so would, it is submitted, violate her obligation to apply her law as it stands to matters concerning federal right, see *Testa* v. *Katt*, 330 U. S. 386; *Wright* v. *Georgia*, 373 U. S. 284, 291; *Bouie* v. *Columbia*, —— U. S. ——, 12 L. Ed. 2d 894, 901.

It is submitted, therefore, that the remand of the South Carolina cases for consideration of the effect of the Civil Rights Act would be a uselessly delaying procedure, and that (even on the assumption that the abative effect of that Act is one of state law) this Court ought now finally to reverse the *Hamm* conviction.

II.

Petitioners' Convictions Enforced Racial Discrimination in Violation of the Fourteenth Amendment to the Constitution of the United States.

A. *The States of Arkansas and South Carolina Are Involved in the Acts of Racial Discrimination Sanctioned in These Cases Because Such Acts Were Performed in Obedience to Widespread Custom, Which in Turn Has Received Massive and Long-Continued Support From State Law and Policy.*

Petitioners submit that this argument goes to the very heart of the known historic and present truth about the connection between the segregation pattern, clearly exemplified in these cases,[4] and the public power of the Southern states. With the deepest respect, petitioners are content to adopt the language of the dissenting opinion in *Bell* v. *Maryland*, —— U. S. ——, ——, 12 L. Ed. 2d 822, 860:

> This contention rests on a long narrative of historical events, both before and since the Civil War, to show that in Maryland, and indeed in the whole South, state laws and state actions have been a part of a pattern of racial segregation in the conduct of business, social, religious, and other activities. *This pattern of segregation hardly needs historical reference to prove it.* [Emphasis added.]

To the familiar history referred to in the emphasized sentence, it need only be added that (unlike Maryland, see *Bell* v. *Maryland*, *supra*, 12 L. Ed. 2d at p. 860, n. 21 (dissenting opinion)) neither Arkansas nor South Carolina has shown the slightest tendency to attempt to break the

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[4] See pp. 8-12, *supra*.

iron chain of causation that links the past with the present. As late as 1959, the officially stated objective of the governor of Arkansas was the "continuation of segregated schools." Inaugural Address, 4 Race Rel. L. R. 179 (1959). In 1958, the Arkansas legislature authorized the closing of schools to prevent compliance with federal court orders to desegregate. Ark. Stat. 80-544, Acts 1958 (2d Ex. Sess.), No. 4, §1, p. 2000. Only two years earlier, South Carolina's legislature passed a joint resolution of Interposition and Nullification,[5] obviously directed at the decisions of this Court in the field of segregation. On the statute books of Arkansas still stand requirements of segregation in railroad[6] (including waiting rooms[7]), streetcars,[8] buses,[9] schools,[10] penal institutions,[11] deaf and blind institutes for children,[12] chain gangs,[13] any "establishment where gaming is legal,"[14] and other places. Present law in South Carolina segregates station restaurants,[15] railroads and steamboats,[16] streetcars,[17] chain gangs,[18] circuses and traveling shows,[19] colleges (which must close if

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[5] S. C. Acts and Joint Resolutions 1956, No. 914.

[6] Ark. Stat. Ann. §73-1218 (1957).

[7] *Ibid.*

[8] Ark. Stat. Ann. §73-1614 (1957).

[9] Ark. Stat. Ann. §73-1747 (1957).

[10] Ark. Stat. Ann. §80-509 (1960).

[11] Ark. Stat. Ann. §§144, 145 (1947).

[12] Ark. Stat. Ann. §80-2401 (1960).

[13] Ark. Stat. Ann. §76-1119 (1957).

[14] Ark. Stat. Ann. §84-2724 (1960).

[15] S. C. Code §58-551 (1962).

[16] S. C. Code §§58-714, 58-719, 58-720 (1962).

[17] S. C. Code §§58-1331, 58-1340 (1962).

[18] S. C. Code §§55-1, 55-2 (1962).

[19] S. C. Code §5-19 (1962).

ordered to desegregate),[20] textile factories,[21] parks,[22] and schools.[23]

With these laws on the books, it would outrage good sense to disregard the causal nexus that binds these states' segregation custom to their laws and policies, on the ground that it is politic to treat the past as something best forgotten. The past is still the official policy of Arkansas and South Carolina.

But even if that were not so, there is no reason to treat contemporaneity as the test of causality—to say that the firmness of the segregation custom can today owe nothing to the forces of law that surely gave it power for decades (if they did not partly create it), merely because that legal support is withdrawn, by the decisions of this Court if not by state repentance and repeal. The judgment that past institutions have no causal connection with the present is never warranted, but it should be particularly obvious that it is unwarranted in the context of race relations, where the rule of the past comes from so far back; even from the days of slavery.

It is not proposed that the present generation of Arkansans and South Carolinians be penalized for what their ancestors did[24]—if that could be thought factually to the point, given the present-generation official stance of these states. It is rather proposed that, where Arkansas and South Carolina themselves move to send petitioners to jail for disobeying orders given in conformance with the segre-

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[20] S. C. Code §22-3 (1962).

[21] S. C. Code §40-452 (1962).

[22] S. C. Code §51-2.1 (1962).

[23] S. C. Code §21-751 (1962).

[24] *Bell* v. *Maryland*, —— U. S. ——, ——, 12 L. Ed. 2d 822, 860 (dissenting opinion).

gation custom that has for many decades been the keystone of the public policy of each state, the state not be allowed to visit this penalty on these petitioners, on the utterly unrealistic theory that state power is to no extent involved. The state " . . . will not be heard to make this contention . . . " *Peterson* v. *Greenville*, 373 U. S. 244, 248, when the force of its policy has for so long been directed to maintaining a segregated society, a society in which store managers would, predictably in custom, give just such orders as these petitioners stand convicted of disobeying.

Nor is it, with the deepest respect, a valid objection to this argument, that the settled and state-supported custom of one section of the nation infects with Fourteenth Amendment invalidity actions taken in conformity to that state-supported custom, while the same conditions cannot be predicted of another section. Here is no question of leniency, or of two Fourteenth Amendments,[25] but of one Fourteenth Amendment, justly applied to conditions which in fact do vary. Cf. *In re Rahrer*, 140 U. S. 545 (1891). How could it be otherwise? The very question that is being asked is whether state power bears a causal relation to the discriminatory act. How could it be that the answer to this question would be the same, whether or not the particular state had for three-quarters of a century based its political and civic life on the proposition that such acts of discrimination are necessary and wholesome?

It would be most unlenient to the Negro in the South to close one's eyes to the fact that massive and long-lasting state policy has significantly contributed to the discrimination that affects him.

A connected point of less general application may be made. As shown above, statutes still in force in Arkansas and South Carolina command extensive segregation, in

[25] *Ibid.*

schools, transportation, and places of public resort, though none directly touches restaurants, except station restaurants, restaurants in waiting rooms, restaurants at certain places of public amusement, and (presumably) railroad dining cars.[26] These statutes are part of the present in the strictest sense; they raise no problem about causal connection with past policies. Petitioners submit that this Court may recognize that the custom of segregation is not a set of isolated phenomena but a general pattern,[27] and that the general custom of restaurant segregation is shored up and given dignity by the law's command that some restaurants, and other public facilities, be segregated.

This connection is emphasized by the fact that Congress, in Title II of the Civil Rights Act of 1964, has clearly recognized the intimate connection between travel and the enjoyment of public accommodations, including those of the very sort here involved. If the segregation of restaurants is a clog on travel, is it unreasonable to conclude that the segregation of travel reacts to reinforce restaurant segregation? If law has teaching authority, and if the restaurant keeper and his white patron know that the authority of the state's law teaches that Negroes are unfit to ride a streetcar in the same seats as whites, is it doubtful that they will be led, to some degree, to the conclusion that Negroes are unfit to eat at the same counter as whites?

In *Robinson* v. *Florida*, —— U. S. ——, 12 L. Ed. 2d 771, this Court held that, although no state statute commanded restaurant segregation, an administrative regulation requiring racially separated lavatories in non-segregated restaurants sufficiently burdened desegregation to amount to forbidden state action, since it was " . . . bound to discourage the serving of the two races together." 12 L. Ed. 2d at p.

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[26] See *supra*, nn. 6-23.

[27] See *supra*, p. 46.

773. Surely the knowledge that the state maintains a segregation code as to many of the most important concerns of life amounts to a much greater discouragement. In Arkansas and South Carolina, the restaurant keeper who desegregates does so knowing that he thereby transgresses a state policy, expressed in many laws, that the races shall be kept apart. To conclude that the expense of a separate toilet is a greater discouragement to desegregation than is the state's official endorsement of travel, school, racetrack, or even station restaurant segregation, is to elevate the tangible above the moral. It is worse; it is to elevate the trivially tangible over the po lerous moral influence of the state's solemn judgment that segregation is wise and right, a judgment standing in its statutes where all may read. It is even more than that; it is to elevate the only seemingly tangible above the moral, for the administrative regulation given this effect in *Robinson* was obviously invalid, under the decisions of this Court, and could not in a pinch prevail. Like the Arkansas and South Carolina segregation laws, though on a much smaller scale than these, it could in the end serve only as an official state endorsement and espousal of the segregation principle.

B. *The Employment of the State Judicial Power, Together With State Police and Prosecutors, to Enforce the Racial Discrimination Here Shown, Constituted Such Application of State Power as to Bring to Bear the Guarantees of the Fourteenth Amendment.*

The doctrine of *Shelley* v. *Kraemer*, 334 U. S. 1 is here clearly applicable. That case settled the proposition that state action, of the kind requisite for invoking the Fourteenth Amendment, is to be found in the use of state judicial machinery to enforce a privately-originated scheme of racial discrimination. Unless that case is to be overruled, or irrationally "distinguished" away, it applies *a*

fortiori, to these cases, where not only the state judicial powers but also the powers of police, prosecutors, and attorneys-general have been brought to bear. In these cases, the police were on the alert, ready to act as formal witnesses to the "warning" required by the statute. The judicial proceedings were criminal in nature, carried on by the public prosecutor at public expense, with the state appearing as a party in its own interest, in knowing support of the discriminatory scheme, sanctioning the latter within its own public order, and not merely standing by to enforce private rights by civil process, as in *Shelley* v. *Kraemer, supra.*

It is submitted, with the utmost respect, that no suggested distinction of this case from *Shelley* is successful.

It is true that covenants at bar in *Shelley* were functionally equivalent to zoning ordinances, or could be so if adopted on a wide scale, as they doubtless were in many localities.[28] But this is not a ground of distinction of these cases from *Shelley*. Instead, the similarity is striking. Virtually universal, though nominally "private," discrimination in places of public accommodation, backed up by alert police and by criminal prosecution, is the exact functional equivalent of restaurant segregation imposed by city ordinances. It makes no difference to a Negro which of two legal formalities assures his being barred from all the good restaurants and most of the bad ones in town, any more than it made a difference to him which doctrinal route—"zoning" or "private covenant"—led to his being unable to live in the neighborhood he liked and could afford. Cf. *Terry* v. *Adams*, 345 U. S. 461.

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[28] *Bell* v. *Maryland*, —— U. S. ——, ——, 12 L. Ed. 2d 822, 857 (dissenting opinion).

The "property rights" act of 1866, 14 Stat. 27, 42 U. S. C. §1982, furnishes no ground of distinction.[29] That statute, which antedated the Fourteenth Amendment, was used by the *Shelley* Court only as an aid in establishing that the right to hold property was within the terms of the Amendment. 334 U. S. 10-11. That could hardly have been doubted. Both *Shelley* and *Hurd* v. *Hodge*, 334 U. S. 24, 31 explicitly recognize that the statute, like the Fourteenth Amendment, protects only against governmental action. The true problem in *Shelley* v. *Kraemer* was not whether the right to hold property and live in it was a protected right, as in some sense clearly it was, but rather *whether that right was infringed by governmental authority*, where the judicial power was lent to the enforcement of a purely private contractual scheme which practically frustrated the enjoyment of the right.

In the present cases, similarly, all must agree that petitioners have, in some sense, a "right," under the Fourteenth Amendment, not to be barred from restaurants. They have that right just as clearly as they have the right to purchase and enjoy property. The question is, against what kind of action, on whose part, does the "right" run? *Shelley* very clearly held that the "right" to enjoy property was infringed by forbidden state action when the judicial arm of the state lent its enforcement to a "purely private" arrangement.

Of course the right claimed here differs from that claimed in *Shelley;* one involves a house, the other a sandwich. The similarity of the cases is located at the very point at issue here—at the point of determining what defines "state action," not for the purpose of deciding whether the right is one the state may not invade—for that is obvious in both cases—but for the purpose of deciding

[29] *Ibid.*

whether the state *has invaded it*, by judicially supporting a discriminatory scheme of private origin. On this point, the cases are not materially distinguishable.

It has been said that a "property" right is being vindicated in these cases, and that this distinguishes *Shelley*.[30] It is not clear why this would make any difference. But in any case a strict "property" right, of great value to the possessor and adjudicated to be his by state law (the only law defining property rights) was present in *Shelley*—the easement created by the covenant.

The state court in *McGhee* v. *Sipes*, companion case to *Shelley*, so described it; see Record in U. S. Supreme Court in *McGhee* v. *Sipes*, 334 U. S. 1, No. 87, Oct. Term, 1947, p. 51. The brief of the respondents, in *Shelley*, very carefully argued the point that a property right, in the nature of a negative easement, was at stake.[31] This property right was appurtenant to and importantly served the most valuable property right of all, the enjoyment of one's house. Yet this Court held that judicial vindication of this property right, whether in equity or by damages, *Barrows* v. *Jackson*, 346 U. S. 249, was forbidden.

It has been said that *Shelley* concerned only the willing buyer and the willing seller.[32] This is wrong on the face of *Shelley*. The protagonist and chief actor was the most unwilling neighbor, the covenantee on a solemn obligation and the possessor of the property right in the nature of a negative easement, all of which he had acquired by "purely private" means, irrefragably valid under state law. The one and only reason for his being, in all prac-

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[30] *Id.* at 858.

[31] Brief for Respondents, p. 72, *Shelley* v. *Kraemer*, 334 U. S. 1.

[32] *Bell* v. *Maryland*, —— U. S. ——, ——, 12 L. Ed. 2d 822, 858 (dissenting opinion).

tical effect, deprived of the benefit of his contractual and property rights was that judicial action in merely enforcing them—not at all in creating them—was held to be forbidden by the Fourteenth Amendment.

So, in these cases, the restaurant owner has a "property right." Absent the Fourteenth Amendment, he could have the aid of the courts in using that property right to keep any Negroes from being where he did not want them to be and where his "property right" said he could keep them from being—just as, absent the Fourteenth Amendment, the owner of the valuable easement in *Shelley* could have the aid of the courts in keeping Negroes from living where the easement he held gave him the vested property right to exclude them. But there is a Fourteenth Amendment, and the extension of its ban to judicial enforcement of racial discrimination is as valid in the one case as in the other.

These cases do not raise the general question whether the Fourteenth Amendment forbids the prosecution of crimes against racists and their property.[33] Of course it does not. They raise, instead, the very question so clearly raised and settled in *Shelley*—whether the state may lend its aid to the enforcement of the racism itself, in the public life of the community. *Shelley* held that the state could not recognize and enforce a property right well settled under state law, where such enforcement gave sanction to a pattern of racial discrimination, even though the discrimination was "private" in origin. These cases present just that issue. Neither in *Shelley* nor here is any attack made on the right of the racist to be protected generally by the law.

The technical distinctions from *Shelley* quite fail. Equitable and prudential considerations powerfully suggest the

[33] *Id.* at p. 856.

undesirability of giving undeserved effect to such distinctions; on policy and equity, or as strict law, the present cases are not less but more appealing than *Shelley*. The setting up of arrangements to keep one's neighborbood white, however unworthy, has about it at least a slight flavor of the genuinely rather than the fictitiously "private." The identity and characteristics of one's neighbors are substantial matters, next door to the domestic. No reasons of equity or policy suggest the desirability of searching out forced distinctions between these cases and *Shelley*, with which they are so impressively similar, in that the key factor in both instances is the knowing use of the judicial power to enforce racial discrimination.

(It has been suggested[34] that the Civil Rights Statute cited above, 42 U. S. C. §1982, has some inverse application to cases of this sort, and that, by virtue of its terms, the owner of premises such as those involved in the present cases enjoys a " . . . federally guaranteed right . . . ," a " . . . federal right . . . " against the entry of unwanted customers. With the greatest respect, it must be pointed out that the allowing of any such " . . . federally guaranteed . . . " right would have the effect of invalidating state public accommodations statutes. The statute, on its face, guarantees only such rights as are enjoyed by all "white persons." If no such persons may invoke the judicial machinery to enforce racial discrimination, it would seem that the statute is fully satisfied.)

Petitioners recognize that the *Shelley* doctrine might, unless means of principled limitation are available, lead to invasion of the purely private life, for the truth is that "state action" of the *Shelley* kind often supports or stands ready to support the authentically private choices of the individual in his family and social life. Petitioners intend

[34] *Id.* at 859.

to urge upon the Court that the road to avoiding this unwarranted and absurd result lies not in elaborating unsound distinctions in the realm of "state action"—which is obviously present here at least as much as it was in *Shelley*—but rather by the application of a reasonable canon of interpretation to the substantive guarantees of the Fourteenth Amendment. See Point II-D, *infra*.

Finally, under this Point and with reference back to Point II-A, petitioners argue that, if either of them be thought insufficient, in coaction they are irresistible. In their well known social and historical context, these cases are convictions, procured by the state, with its police, prosecutors, and judicial machinery, for failure to obey an order given in compliance with a custom which it has been the dearest interest of the state to foster, and to which the state now generally gives moral sanction by a Jim Crow code still on the books. If these convictions are to stand, on the theory that there is no state action in any form, *Civil Rights Cases*, 109 U. S. 3, 14, then the "state action" concept has come to be a symbol of futile technicality, lacking relation to life.

C. The Obligation of These States Under the Fourteenth Amendment Is an Affirmative One—the Affording of "Equal Protection of the Laws." That Obligation Is Breached When, as Here, the State Maintains a Regime of Law Which Denies to Petitioners Protection Against Public Racial Discrimination, and Instead, Subordinates Their Claim of Equality in the Common and Public Life of the States to a Narrow Property Claim, Enforcing the Subordination by the Extreme Sanction of the Criminal Law.

On the face of the "equal protection" clause, that clause imports no requirement of "state action." "State action"—a lawyer's shorthand term nowhere occurring in the Constitution—is manifestly inapt to the equal protection clause. What that clause says is that a state may not *deny* "equal

protection of the laws." "Denial" may be by inaction alone, as well as action, or by the subtle combination of inaction and vigorous action that marks the cases now at bar.

It is submitted that the obligation imposed on the state is that of maintaining a regime of law in which—without reference to those barren distinctions between action and inaction which have proven so useless in other fields of law—the Negroes, whose protection was the dominating purpose of the Fourteenth Amendment, are in fact protected against gross discrimination in the common public life of the states.

The historical evidence supporting this view of the Fourteenth Amendment, and especially of its equal protection clause, has been so recently and so fully presented in this Court as to make otiose its full review.[35] Petitioners believe that it is of much greater importance—of decisive importance—to be clear about just what it is that one may look to see established by the historical data so lately canvassed.

Petitioners do not contend that the enormous mass of historical evidence on the adoption of the Fourteenth Amendment, and of the statutes tied in time and temper with that Amendment, establishes, without any contradiction and without any countervailing evidence, that two-thirds of each House of the 39th Congress, and a majority of each house of three-quarters of the ratifying state legislatures would have thought that the Fourteenth Amendment put the states under an obligation to maintain regimes of law in which these petitioners would be protected against public discrimination at lunch counters in establishments to which they were invited as customers. Where general language is used, for general purposes, that kind of burden

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[35] Brief for the United States as Amicus Curiae, pp. 111 ff, *Bell* v. *Maryland*, —— U. S. ——, 12 L. Ed. 2d 822; *Bell* v. *Maryland*, 12 L. Ed. at 832.

can almost never be maintained. It could not be maintained as to the Fourteenth Amendment right of Negroes to be tried by juries selected without racial bias. It could not be maintained in regard to the holding in *Buchanan* v. *Warley*, 245 U. S. 60, or in *Brown* v. *Board of Education*, 347 U. S. 483. It assuredly could not be maintained as to the holdings in *Terry* v. *Adams*, 345 U. S. 461, or in *Marsh* v. *Alabama*, 326 U. S. 501. It could not have been maintained, *mutatis mutandis*, as to the holding in *Martin* v. *Hunter's Lessee*, 14 U. S. (1 Wheat.) 304. History rarely, if ever, affords that kind of aid to the expounding of Constitutions.

On the other hand, nothing remotely approaching a definite negative showing on the same question can be made. Here petitioners refer, with deep respect, to the dissenting opinion in *Bell* v. *Maryland*, —— U. S. ——, ——, 12 L. Ed. 2d 822, 850. That opinion, in its Part IV, argues either from silence or from the irrelevance of evidence elsewhere cited; nothing positive is cited to establish the affirmative existence of an intent to exclude from the Amendment's reach such state actions, and inactions, as these cases illustrate.[36]

Petitioners submit, therefore, that nothing in history can obviate the necessity for this Court's looking to the general purposes of the Reconstruction Amendments, and then individuating and making concrete those purposes, in this year, and in the light of all that is this year known concerning the position of the Negro in our society, the public importance of public accommodations, and the relations of state power to private power.

Petitioners submit that, for this purpose, the history referred to in Mr. Justice Goldberg's concurring opinion in *Bell* v. *Maryland*, —— U. S. ——, ——, 12 L. Ed. 2d 822,

[36] See *Bell* v. *Maryland*, —— U. S. ——, ——, 12 L. Ed. 2d 822, 860-865 (dissenting opinion).

832, and in the Supplemental Brief as Amicus Curiae filed by the United States in that case (at pp. 111 ff.), by a very heavy preponderance establishes that the guarantee to Negroes of equal access to places of public accommodation ought to be taken to be one of the characteristics of the regime of law which the states are commanded, by the Fourteenth Amendment, to maintain. The historical data put forward in those places show a purpose to require the maintenance of a society of substantial as well as formal equality, with respect to the public life of the community.

Beyond this point, and with little more help from history, this Court must proceed as in the earliest cases under the Amendment:

> We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freemen and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. *Slaughter House Cases*, 83 U. S. (16 Wall.) 36, 71.
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> One great purpose of these Amendments was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color. *Ex parte Virginia*, 100 U. S. 339, 344-345.

> What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the Amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race. *Strauder v. West Virginia*, 100 U. S. 303, 307-308.

The legal systems of Arkansas and South Carolina were confronted with an unavoidable choice. Two interests are asserted. One is the interest of the owners of real property, dedicated to a public business, generally opened to the public, and opened even to Negroes in all respects but one, in effecting a racial discrimination with respect to facilities dispensing the prime necessity of life. The other is the interest of Negroes in being free from the tangible inconveniences and moral humiliation of widespread racial discrimination in respect to the enjoyment of facilities otherwise altogether public. The choice between these interests is a real choice.[37] It does not lie in the nature of things that one or the other must prevail. The legal system that makes the choice is doing something. It is affirmatively

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[37] Cf. *Bell v. Maryland*, —— U. S. ——, ——, 12 L. Ed. 2d 822, 847-849 (concurring opinion); *Id.* at pp. 873-875 (opinion of Justice Douglas).

electing to deny to Negroes the protection of the laws in one respect, while granting the laws' protection to widespread racial discrimination against them. Such a decision is not and cannot be merely neutral; it weighs interests and selects one for favoring and one for rejection.

In the cases imposing segregation by law under that name, the state had weighed the interest of Negroes against the interests of those whites who desired segregation, and struck a balance in favor of satisfying the desires of the latter. That decision was nullified by the Fourteenth Amendment. In these cases, the state has weighed the interests of the Negroes against the property interests of store proprietors, and struck a balance in favor of the latter. But the property claim of a store owner has no greater dignity than the psychological comfort of white citizens who want to eat in segregated surroundings and who implement that preference by successfully supporting the passage of segregation laws. If the latter interest is not of sufficient weight to justify the state in supporting segregation, why should the former be? If no consideration of policy can justify the state in choosing to support segregation in public places, how can a narrow "property right," which as a live interest consists only in the right to exclude Negroes, have that effect?

"Property" is a part of law, and has its being in law. American states and foreign nations do in fact balance the claims of "property" against other claims, including the claim to be free of racial discrimination. Free access to places of public accommodation is one of the things our legal culture commonly regulates, it is something law may be expected to deal with.

The denial of protection against racial discrimination in regard to places of public accommodation is a matter of substance, both tangibly and morally. The regime that

denies this protection breaches its affirmative obligation under the Fourteenth Amendment.

It has long been recognized by this Court that a state, by merely permitting activity which frustrates a constitutional guarantee, may violate the Constitution. The opinions in *Terry* v. *Adams*, 345 U. S. 461, are instructive:

> For a state to *permit* such a duplication of its election processes is to *permit* a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. . . . It violates the Fifteenth Amendment for a state, by such circumvention, to *permit* within its borders the use of *any device that produces an equivalent* of the prohibited election (Justice Black (with Justices Douglas and Burton), 345 U. S. at 469). [Emphasis added.]
>
> The application of the prohibition of the Fifteenth Amendment to "any State" is translated by legal jargon to read "State action." This phrase gives rise to a false direction in that it implies some impressive machinery or deliberative conduct normally associated with what orators call a sovereign state. The vital requirement is State responsibility—that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored (Justice Frankfurter, 345 U. S. at 473).
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> The evil here is that the State, through the action *and abdication* of those whom it has clothed with authority, has *permitted* white voters to go through a procedure which predetermines the legally devised primary (at 345 U. S. at 477). [Emphasis added.]
>
> Consonant with the broad and lofty aims of its Framers, the Fifteenth Amendment, as the Fourteenth,

"refers to exertions of state power in all forms." Accordingly, when a state structures its electoral apparatus in a form which devolves upon a political organization, the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play (Mr. Justice Clark with Chief Justice Vinson and Justices Reed and Jackson, 345 U. S. at 484).

The cases at bar are sharper. Here the state not only permits conduct which frustrates and makes worthless the Fourteenth Amendment guarantee against segregation by public power, but also puts the weight of its criminal sanctions behind that conduct. Cf. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715; *McCabe* v. *Atchison, Topeka & S. F. R. Co.*, 235 U. S. 151; *Lynch* v. *United States*, 189 F. 2d 476 (5th Cir. 1951), cert. den. 342 U. S. 831; *Catlette* v. *United States*, 132 F. 2d 902 (4th Cir. 1943).

It recently has been pointed out that the opinion in the *Civil Rights Cases*, 109 U. S. 3, explicitly rested on the assumption that a failure by the state to provide equal access to places of public accommodation would bring the Fourteenth Amendment into play. Mr. Justice Goldberg, concurring in *Bell* v. *Maryland*, —— U. S. ——, ——, 12 L. Ed. 2d 822, 844-45. Cf. *United States* v. *Cruikshank*, 92 U. S. 542, 554-555.

Petitioners have contended here that the Fourteenth Amendment imposes an affirmative obligation on the states to protect against public racial discrimination. It is clear, however, that federal judicial enforcement of that obligation, in its affirmative sense, would present difficult problems. Congress has now filled a part of the gap. It may be that, as an affirmative obligation unsupported by implementing statute, this obligation would have to remain partly

a moral one; cf. *Kentucky* v. *Dennison*, 65 U. S. (24 How.) 66. But these cases raise none of these questions. If the states, as petitioners here contend, have even so much as a moral obligation, under the Fourteenth Amendment, to maintain legal systems such as to make impossible this gross public racial discrimination, then *a fortiori* no state may, as in these cases, set its criminal law enforcement machinery affirmatively in motion to support and defend that discrimination.

D. *None of the Theories of "State Action" Urged by Petitioners Needs to Result in the Extension of Fourteenth Amendment Guarantees to the Genuinely Private Concern of Individuals, for a Reasonable Interpretation of the Substantive Guarantees of the Amendment Can and Ought to Prevent That Result.*

Petitioners have urged that:

1. Where state-supported custom is the matrix of the nominally private act of discrimination, the requisite "state action" is found (II-A).

2. Where state judicial and prosecutorial power implements and enforces racial discrimination, the requisite "state action" is present, under the rule of *Shelley* v. *Kraemer*, 334 U. S. 1 (II-B).

3. Where the state maintains a regime of law giving legal sanction to widespread racial discrimination in public places, the state so acts as to "deny" equal protection of the laws (II-C).

It is submitted that no one of these theories concerning "state action" is in itself difficult to follow or to accept. Uneasiness about each of them, and about their coactive effect, springs, it is respectfully suggested, from the fear that following their logic to the limit will result in the

application of Fourteenth Amendment standards to the truly private life.

Petitioners submit that this result, unwanted and absurd, is logically to be avoided not by the elaboration of unsound distinctions in the realm of "state action," but rather by the discernment and use of a canon of interpretation of the Fourteenth Amendment, limiting that Amendment's force to the functionally public life. That methodologic line, broadly warranted both by the history of the Amendment and by its placement in the total legal and racial context of our civilization, has the great merit of attempting to draw the line in the place where the line is needed and wanted. See Henkin, *Shelley* v. *Kraemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962).

In these cases, the records show that no private or personal associational interest is at stake. The "owners," ultimately responsible for the decision to exclude petitioners, do not personally figure in the events shown by testimony. Nothing but a palpably fictitious personification can bring any personal associative interest into these cases at all. See the opinion of Mr. Justice Douglas in *Bell* v. *Maryland*, —— U. S. ——, ——, 12 L. Ed. 2d 822, 867, where the totally fictitious character of the "personal" associational interests in these cases is exhaustively shown. It must be an uncomfortable argument that can make its points only by systematic metamorphosis of a business corporation into a human being—by the systematic substitution of "he" for the correct "it," of "his" for the correct "its."

By the same token, these cases concern events in the fully public life, the part of life where privacy and private choice are generally irrelevant. No one expects to choose his surrounding company in a public restaurant, and customer-by-customer "choice" by proprietors or managers is as good as unknown. Restaurant racial segregation, on

the other hand, is a regional and national public problem. It defines the public racial character of cities and states. It is a feature of that part of life to which "citizenship" is fully relevant, if the "citizenship" granted by the Fourteenth Amendment is more than the right to be called a "citizen" while being publicly treated as a sub-human. See Mr. Justice Harlan, dissenting in *The Civil Rights Cases*, 109 U. S. 3, 46-47; cf. U. S. Const., Art. IV, §2.

There is no competing federal constitutional claim, such as the interest in freedom of religion or freedom from unauthorized search and seizure, to be weighed against petitioners' claim to immunity from public racial discrimination. Cf. Henkin, *op. cit. supra*, at pp. 495, 496.

The business places here concerned are abundantly regulated by law; their conduct is a part of the normal regulatory regime of modern law. South Carolina right now has on its books a regulation requiring segregation in carrier station restaurants; Arkansas, by regulating access to certain public places, imposes regulation, by necessary consequence, on the formation of the restaurateur-patron relationship in those places. How can these states be heard to assert that "private choice" is relevant to these situations?

De facto segregation, by corporate ownership choice in coaction with state criminal law, is the exact functional equivalent of that segregation by law which is forbidden by the Fourteenth Amendment. A minimal and technical "property" interest is made to support a regime exactly resembling that segregation which the Fourteenth Amendment forbids. Cf. *Terry* v. *Adams*, 345 U. S. 461, 466, 470.

None of these considerations, it must be made clear, literally supplies "state action." "State action," rather,

is to be found in these cases under the theories expressed in Points II-A to II-C, *supra*. The considerations just rehearsed suggest the means for bringing it about that realistic and clear-sighted views on "state action" not bring the Fourteenth Amendment into the living-room. The way to keep it out of the living-room is not to pretend that state power does not support the choices made in the living-room—for clearly it does—but rather, to consider those very factors which make it absurd, within our legal culture, to suppose that it substantially ought to be interpreted to reach the living-room. Those factors have to do not with "state action," but with genuine as opposed to fictitious privacy. They are factors which go not to the presence or absence of "state action," but to the reasonable interpretation of the substantive guarantees of the Fourteenth Amendment.

This Court could not now, without violating all the wisdom of the case-law process, attempt to decide every case that intellectual curiosity might imagine, along the borderlines suggested by the above considerations. But this Court can now take note of the fact that amply sufficient considerations, resting on the broadest common sense and quite outside the "state action" field of force, can be invoked, if the need should ever arise, to keep the Fourteenth Amendment out of the authentically private life of man, without conjuring away the "state action" that so palpably exists in these cases.

It has been suggested that the acceptance of theories similar to those urged here would leave the Court helpless to draw reasonable lines, adapted to keeping the Constitution out of purely private relations.[38] The "state action" concept has proven to be very far from a precise tool for this

[38] *Bell v. Maryland*, —— U. S. ——, 12 L. Ed. 2d 867 (dissenting opinion).

purpose. Nor is it true that legislation can or does exempt the Court from weighing and assessing factors definable only by degree.[39] In administering the new Civil Rights Act, for example, the courts will have to decide, presumably, whether "reasonable cause" exists to believe that a "pattern or practice" of segregation exists (§206). Nor is this process of judicial weighing confined to those cases where the statute clearly invokes it. Whether, for example, a proprietor "actually occupies" an establishment as his "residence" (§201(b)(1)) can very surely, in the borderline cases, call for a court's assessment of matters of degree.

Such decisions must always be made by courts. See Holmes, *J.*, partially concurring in *LeRoy Fibre Co.* v. *Chicago M. & St. P. Ry.*, 232 U. S. 340, 354. The important thing is to try to locate the line between the very things it is desired to keep separate. In this context, the line is needed between discrimination in the public common life of communities and discrimination in the private life of individuals. Its location there, with whatever vagueness at first, at least puts it between the things that ought to be separated, in consonance with the spirit and purpose of the Fourteenth Amendment. The "state action" concept can draw that line only by accident, by conceptual manipulation; it never can begin to draw it right. The concept of an opposition between the public, communal life, and the private life, is a beginning toward drawing the right line. That beginning once made, these cases present no problem, for they are a very long way from the line.

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[39] *Id.* at 866, 867.

III.

These Convictions Violate Due Process in That There Was Inadequate Conformity Between Definite Statutes and the Conduct Proved.

A. *These Convictions in Both Cases Violated Due Process of Law, in That They Were Had Under Statutes Which, in the Procedural and Evidentiary Context, Fail to Designate as Criminal the Conduct Proven, With the Clarity Required Under Decisions of This Court.*

In the very recent case of *Bouie* v. *Columbia*, —— U. S. ——, 12 L. Ed. 2d 894 (1964), this Court had occasion to apply, to a "criminal trespass" statute of South Carolina, the settled rule that due process is not afforded where punishment is inflicted under a statute which fails, as a matter of ordinary language, to designate the conduct shown by evidence in the case. As that opinion suggests, —— U. S. at pp. ——, 12 L. Ed. 2d at pp. 897-98, the objection to such a conviction may be in the alternative, where the language of the statute is seemingly precise. On the one hand, a conviction on a record showing conduct that does not fall at all within the normal meaning of the statute as written may be repugnant to the rule of *Thompson* v. *Louisville*, 362 U. S. 199, as constituting conviction without any evidence of commission of the crime charged. On the other hand, if a judicial fiat of "construction" stretches the statute to cover, in defiance of the ordinary meaning of words, then the application of that construction violates due process.

> If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes," as in Lanzetta, or to "guess at [a statute's] meaning and differ as to its application," as in Connally, the violation is that much greater when,

> because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the conduct in question.
>
> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language. As the Court recognized in Pierce v. United States, 314 U. S. 306, 311, 62 S. Ct. 237, 239, "judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Bouie* v. *Columbia*, —— U. S. at p. ——, 12 L. Ed. 2d at p. 899.

The cases at bar fall under one or the other of these principles. Probably the second is the more applicable. But in either event the convictions must be reversed.

The Arkansas statute reads as follows:

> Any person who after having entered the business premises of any other person, firm or corporation, other than a common carrier, and who shall refuse to depart therefrom upon request of the owner or manager of such business establishment, shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00), or by imprisonment not to exceed thirty (30) days, or both such fine and imprisonment. Acts 1959, No. 14, §1.

The South Carolina situation is more complicated. The warrant of arrest in the *Hamm* case designated no statute, and the prosecutor refused to make election among the

statutes under which he might have been thought to be proceeding (R. Hamm 6, 7). This fact constitutes a separate ground, though closely involved with the one now immediately under scrutiny, for reversal, and will be discussed in Point III-B. For present purposes, it may be assumed[40] that the City's chief reliance was on Section 16-388 (2), Code of Laws of South Carolina, 1952, as amended 1960:

> Any person:
>
> (1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned, within six months preceding, not to do so or
>
> (2) Who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative, shall on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

It is to be observed that both the Arkansas and the South Carolina statutes are of very recent vintage: neither has any solid history of judicial construction.

On its face (saving minor and irrelevant differences of phraseology), each of these statutes requires the following elements for the establishment of criminality:

1. Entry by defendant into the premises of another person.

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[40] If the assumption is denied, then these convictions clearly fall, for the other two statutes that figured would ground reversal, on the authority of *Bouie* v. *Columbia*, —— U. S. ——, 12 L. Ed. 2d 894. See Point III-B, *infra*.

2. Refusal by defendant to depart *from those premises.* (This is spelled out literally, in the Arkansas Statute, by the word "therefrom". But the case is no less clear for South Carolina; it is impossible, in the context, to imagine any other meaning for "leave" than "leave what has just been referred to as having been entered into, namely, the dwelling house, place of business, or . . . premises of an other person . . . ").

3. The prior giving, by an authorized person, of an order or request *to leave the premises or place of business.* (As for the Arkansas statute, the "request" must be a "request" to do what has just been referred to, "depart *therefrom*"—namely, from the "business premises." As for the South Carolina statute, the order or request "to do so" is an order or request to leave the dwelling house, place of business, or premises; "to do so" has nothing else to which to refer. If this is not what the language means, one would have wholly to guess at its meaning.)

It is affirmatively shown, on the clear testimony of the prosecution's own principal witnesses in each of these cases, that the order given was not an order to leave "the premises," or the "place of business," in any normal acceptation of these words, but an order to leave one particular section of "the premises," one location in the "place of business." One may disapprove of that refusal; one may even think it a civil wrong. But it does not fall within the terms of the statute.

In *Hamm*, one need go no further than the Arrest Warrant (R. Hamm 2), where the "unlawful trespass" was "remaining at the lunch counter," and "refusing to leave said counter . . . after the Manager of said store . . . advised him that he would not be served *and specifically requested him to leave said lunch counter* . . . " Captain Hunsucker, the arresting officer, testified that the Manager, in his

hearing, told petitioner that " . . . he would have to ask them to leave the lunch counter." The very same order ("I will ask you to leave the lunch counter") was then given by Captain Hunsucker. The same officer testified that the Manager, at this same time, advised the petitioner's companion that he could go to the check-out counter to get a refund (R. Hamm 14). This statement is absolutely incompatible with an order to "leave" the premises "immediately." See South Carolina Code §16-386. On the other hand, all this was against a background of general welcome to Negroes, as far the rest of the premises was concerned (R. Hamm 61). The petitioner was welcome on "the premises" and was never asked to leave "the premises." This lunch counter was simply one of the departments of the whole store, across an aisle from another department (R. Hamm 58). It is clearly shown that what was given here was not an order to leave the premises, but an order to move away from one small section of the premises, in no way disconnected from the rest, and forming, *in union* with the other "departments" (i.e., counters) and not in disjunction from them, what would in ordinary language be called the "premises" or "place of business" of McCrory's in Rock Hill.

The *Lupper* situation is similar. The expression "asked to leave" occurs several times in testimony, but the ambiguity is resolved in the state's own testimony. Of the Manager, Officer Terrell testifies "He told us that he had two boys that had refused to leave the *lunch counter* . . . " "He had requested our assistance to get them out *from the lunch counter*" (R. Lupper 29). To another sit-inner, one of the store managerial personnel said " . . . we are not prepared to serve you at this time and will you kindly excuse yourself (R. Lupper 42)," a colloquialism for "leave the table." This lunch counter, on a mezzanine freely accessible by stairs, was simply a part of the "business prem-

ises." No order was ever given, clear or unclear, that these petitioners leave the business premises. The order alleged to have been given was to move away from one part of the business premises; nothing suggests that, if they had moved away from that part they would not have enjoyed the general permission all Negroes enjoyed to shop in the Gus Blass Store (R. Lupper 54).

A general construction of these statutes which would make them fit these cases would have utterly ludicrous results. Such a construction would mean that if a lady came to the ribbon counter in McCrory's, and a clerk thereunto authorized requested her to move away from the ribbon counter, and she stood there two minutes and a half (R. Lupper 47—state's witness said three to five minutes elapsed from his "request" until his return with officers from across the street, by which time petitioners had left the lunch counter and were some distance away from it), then she could be fined a substantial amount of money and sent to jail, though her behavior was orderly and no damage ensued. It may be that such a law would be valid. But it would clash so sharply with all our cultural assumptions that the legislature would have to say very clearly that that is what is meant.[9] In these cases, the legislature has said rather clearly that that is not what is meant. To stretch these laws to cover these cases, one has to take "business premises" or "place of business" to mean not "the business establishment as a whole," but "such section therein as management may, *ad hoc* and without saying so, choose to designate as a separate parcel of land." Such a construction constitutes exactly the sort of judicial ambush that

[9] Such a requirement is not an unreasonable one, *cf.* Va. Code §18.1-173 (1960): "If any person shall without authority of law go upon the . . . *premises of another, or any part, portion or area thereof* . . . he shall be deemed guilty of a misdemeanor . . ." [Emphasis added.]

was condemned in *Bouie v. Columbia*, —— U.S. ——, 12 L. Ed. 2d 894 (1964).

In that case, moreover, this Court had occasion to reaffirm the ancient distinction between civil and criminal trespass. —— U. S. at pp. ——, 12 L. Ed. 2d at pp. 902, 903. If a man is standing by the pickles, in a large delicatessen, and the Manager tells him, "Please move at least six feet away from the pickles," and if he stubbornly stays where he is (in other respects behaving well), then perhaps he is civilly liable for such damages as can be shown to have ensued. It may even be that the Manager, using force to move him, could validly plead *manus molliter imposuit*, though one would expect, even on this, that pretty square corners would have to be cut. But the trespass, if any, is criminal only if clearly covered by a criminal trespass statute, and such statutes are not and have never been anywhere near coterminous in their coverage with the law of civil trespass.

It is cheerfully admitted that these parallels seem at first blush fanciful. The reason is simple: it would seem unnatural and bizarre to bring the criminal law to bear in the cases imagined, while the employment of that law seems expectable and natural in the cases at bar, for all too obvious a reason. But these statutes must be judged and construed in their sweeping generality and neutrality; it is only their appearance of possessing those qualities that saves them at all. In that sweeping generality, considered as purely neutral enactments, they must either, as they seem to do on their face, make criminal only the well-understood act of failing to leave the "premises" *after being ordered to leave the "premises,"* in the normal understanding of the quoted word, or else they make criminal any disobedience to *any* order of a proprietor with respect to the *part* of the "premises" where a person generally

welcomed may sit or stand for a very short time. In the first and more natural meaning, no evidence in these records shows their violation here. (*Thompson* v. *Louisville*, 362 U. S. 199.) If the second and grossly strained meaning be given to them by judicial fiat, these convictions are obnoxious to the rule of *Bouie* v. *Columbia*, *supra*.

The distinction here is a highly substantial one. A state might wish to put its criminal law behind the desire of a proprietor to be altogether rid of certain people, without desiring to place the same extreme sanction behind his orders to them as to where they may sit or stand. Ordering a man out of your house, and ordering him not to sit in a certain chair, are two different things. It is the first of these things, on any normal understanding of English, that these statutes bring under the extraordinary coverage of criminal trespass law.

The appropriateness of a strict insistence on the actual communication of the very order required by the applicable law is brought out, on different facts, by Mr. Justice Harlan, concurring in *Garner* v. *Louisiana*, 368 U. S. 157, 197, 198:

> Nor do I think that any such request is fairly to be implied from the fact that petitioners were told by the management that they could not be served food at such counters. The *premises* in both instances housed merchandising establishments, a drug store in Garner, a department store in Hoston, which solicited business from all comers to the stores. I think the reasonable inference is that the management did not want to risk losing Negro patronage in the stores by requesting these petitioners to leave the "white" lunch counters, preferring to rely on the hope that the irritations of white customers or the force of custom would drive them away from the counters. This view

> seems the more probable in circumstances when, as here, the "sitters'" behavior was entirely quiet and courteous, and, for all we know, the counters may have been only sparsely, if to any extent, occupied by white persons. [Emphasis supplied.]

This passage incidentally, illustrates the normal usage of the word "premises."

These convictions, moreover, penalize actions which were expressive of claims and of views. *Stromberg* v. *California*, 283 U. S. 359; *Thornhill* v. *Alabama*, 310 U. S. 88. The requirements of statutory clarity are in such cases, for reasons often stated by this Court, higher than in the general case. *Winters* v. *New York*, 333 U. S 507.

To summarize, these statutes forbid disobedience to an order to leave the "premises" or "place of business." No such order was given here; the order that was given was an order to move away from one counter on the "premises" or in the "place of business." That such an order is not tantamount to an order to leave the premises or the place of business is shown with logical rigor by the fact that one could obey it and still be on the premises and within the place of business. Petitioners have been convicted of a highly artificial offense, but the artifice has been unsuccessful, because the records show that even that offense was not committed, and these convictions must fall under the rule of *Bouie* v. *Columbia*, —— U. S. ——, 12 L. Ed. 2d 894, or under the rule of *Thompson* v. *Louisville*, 362 U. S. 199.

B. *In the Hamm case, the Defendant Was Denied Due Process of Law by the Refusal of the Prosecutor and Trial Judge to Specify the Law Under Which He Was Charged, by the Consequent Vagueness of the Law Set Forth in the Instructions to the Jury, and by the Variance Between the Law Charged the Jury and the Law on the Basis of Which the State Appellate Courts Sustained Defendant's Conviction.*

There is an independently sufficient ground for outright reversal of the conviction of petitioner Hamm. The arrest warrant charged Hamm only with "Trespass," naming no statute (R. Hamm 3). The supporting affidavit, incorporated in the warrant, charged that Hamm "did willfully and unlawfully trespass upon privately owned property by remaining . . . at the lunch counter in McCrory's variety store, which is customarily operated upon a segregated basis, and refusing to leave said counter . . . [reciting facts], all of which resulted in and constituted a trespass by the above-named defendant, contrary to the peace and dignity of the State of South Carolina, and in violation of the ordinances of the City of Rock Hill. . . ." (R. Hamm 2, 3).[42] Before trial, defense counsel attempted to have the judge require the prosecutor to specify the offense charged, pointing out "that as a matter of due process of law, . . . there are several criminal statutes on the book, and we think that we are entitled to know if they are relying on any ordinance or statutes, specifically which one we are

[42] Among the facts recited in the affidavit was that "racial tension was high due to numerous recent prior demonstrations against segregated lunch counters . . .; both within the City and throughout the South generally, followed by numerous recent trials of demonstrators before this and other Courts. . . ." (R. Hamm 2). The affidavit was amended immediately before trial "to eliminate the references therein to what we have referred to as the background situation" (statement of Mr. Spencer, the prosecutor, at R. Hamm 5), although the amended form does not appear in the record. Obviously the amendment did nothing to clarify the charge, for the prosecutor thereafter insisted on his right to rely on "all of the available law." See succeeding text.

going to have to defend against" (R. Hamm 6). The prosecutor took the position that he relied "upon all of the available law that has a proper bearing upon a relationship to the offense charged" and that "we are not required to specify or spell out exactly what body or provision of law we rely upon, but that we are in fact to rely upon any law which the proof of the facts alleged in the warrant would bring into force, with reference to the offense charged" (R. Hamm 6).

Replying to the court's suggestion that he mention "any specific section which you are including without limiting yourself" (R. Hamm. 7), the prosecutor said "amongst other things" (*ibid.*) he relied on (a) the 1960 order-to-leave-the-premises statute, S. C. Code §16-388(2), set out in part III-A *supra*, p. 72; (b) the entry-after-notice statute, S. C. Code §16-386, *supra*, pp. 4-5, considered by this Court and held insufficient to permit conviction on similar facts in *Bouie v. Columbia*, —— U. S. ——, 12 L. Ed. 2d 894; and (c) a Rock Hill ordinance, §19-12 of the Code of Laws of the City of Rock Hill, *supra*, pp. 5, 6, which is on its face unquestionably subject to the same objections that prevailed in *Bouie* v. *Columbia* with respect to S. C. Code §16-386 (R. Hamm 7). All of this was "without waiving the right to rely upon other sections" (*ibid.*), a right in which the trial judge sustained the prosecution (*ibid.*).[43]

The judge's charge did nothing to clear up the matter. The court began by stating that the defendant was charged with "the offense of trespass" (R. Hamm 84). "If you want to know then what is meant by trespass," the court proceeded to read a portion of the 1960 order-to-leave-the-premises statute, S. C. Code §16-388(2), which does not

[43] In arguing motions for directed verdict and judgment of acquittal, defense counsel again pointed out that he was hampered by lack of specificity of the charge, and requested an election by the prosecution (R. Hamm 38).

speak of trespass (*ibid.*). Leaving no doubt that the defendant could be convicted outside the statute, the court continued by charging on trespass generally, including examples clearly unrelated to §16-388(2):

> "I charge you further that a trespass is the doing of unlawful act, or of lawful acts in an unlawful manner, to the injury of another's person or property, an unlawful act committed with violence, actual or implied, causing injury to the person, property, or relative rights of another, and an injury or misfeasance to the person, property or rights of another, done with force and violence, either actual or implied in law.
>
> "It comprehends not only forcible wrongs, but also acts the consequences of which make them tortious, of actual violence; an assault and battery is an instance; of implied, a peaceable but wrongful entry upon a person's land, or the wrongful remaining upon one's property after ordered to leave. Trespass to property is a crime at common law when it is accompanied by or tends to create a breach of the peace. When a trespass is attended by circumstances constituting breach of the peace it becomes a public offense, subject to criminal prosecution" (R. Hamm 84, 85).

This was followed by a second statement of the terms of §16-388(2), including the element of refusing to leave premises after orders to leave "without good cause or good excuse" (R. Hamm 85). The latter phrase was said to mean a cause or excuse "valid in the eyes of the law" (*ibid.*), but no instructions concerning applicable law were given; rather the "determination of good cause or good excuse is a question of fact for you, gentlemen of the jury" (*ibid.*). The court did not indicate whether a defense of "good cause or good excuse" was available for any other sort of trespass than that said to be condemned by §16-388(2).

The jury found the defendant "guilty" generally (R. Hamm 92). On appeal to the Sixth Judicial Circuit, Judge Gregory affirmed the conviction, obviously without reliance on S. C. Code §16-388(2), since his opinion states that he finds "no distinguishing features" between Hamm's case and another trespass conviction, affirmed in the same opinion, involving a trespass "before enactment of the 1960 Trespass Act" (R. Hamm 97).[11] The Supreme Court of South Carolina in turn affirmed, relying exclusively on §16-388(2) (R. Hamm 101-105) (notwithstanding its later order on motion for a stay recites that Hamm was convicted of the common law offense of breach of the peace, R. Hamm 107).

What emerges from this confusing record, in which nobody yet seems to have got straight the offense of which Hamm was convicted, is this: (A) To the extent that the jury was permitted to convict on a theory of "peaceable but wrongful entry" (R. Hamm 85), the charge could be grounded only upon S. C. Code §16-386 or Rock Hill ordinance §19-12. (See the prosecutor's argument at R. Hamm 49-50.) Conviction so seated is impermissible under *Bouie* v. *Columbia*, *supra*, and a charge permitting it as one of several alternatives requires reversal under the principle of *Stromberg* v. *California*, 283 U. S. 359, and *Williams* v. *North Carolina*, 317 U. S. 287. (B) To the extent that the jury was permitted to convict on the theory that Hamm had done injury to McCrory's "relative rights" by an act of "implied" violence (R. Hamm 84), or an act which "tends to create a breach of the peace" (R. Hamm 85) conviction was had on no evidence, *Thompson* v. *Louisville*, 362 U. S.

[11] Judge Gregory relied upon *Greenville* v. *Peterson*, 239 S. C. 298, 122 S. E. 2d 826 (1961), *rev'd*, 373 U. S. 244, and *Charleston* v. *Mitchell*, 239 S. C. 376, 123 S. E. 2d 512 (1961), rev'd, —— U. S. ——, 12 L. Ed. 2d 1033 (R. Hamm 98). *Peterson* sustained convictions under S. C. Code §16-388(1), (2)—probably principally under subsection (2). *Mitchell* sustained convictions under §16-386 on a theory of trespass *ab initio*.

199; *Garner* v. *Louisiana*, 368 U. S. 157; *Taylor* v. *Louisiana*, 370 U. S. 154, and, in any event, is forbidden by the First and Fourteenth Amendments which do not allow a State to punish peaceful demonstration activity merely because it may "imply" violence, *Terminiello* v. *Chicago*, 337 U. S. 1, or anger others into unjustified violence, *Cantwell* v. *Connecticut*, 310 U. S. 296; *Edwards* v. *South Carolina*, 372 U. S. 229; *cf. Wright* v. *Georgia*, 373 U. S. 284. (C) To the extent that the jury was permitted to convict under §16-388(2), on the theory that Hamm "without good cause or good excuse" (R. Hamm 85) refused to leave the lunch counter, conviction is barred by the vagueness doctrine of *Thornhill* v. *Alabama*, 310 U. S. 88, and *Herndon* v. *Lowry*, 301 U. S. 242. The terms in which goodness of cause or excuse were left to the uncontrolled discretion of the jury makes this a classic instance where "the equilibrium between the individual's claims of freedom and society's demands upon him is left to be struck *ad hoc* on the basis of a subjective evaluation . . . [so] that there exists the risk of continuing irregularity with which the vagueness cases have been concerned." Note, 109 U. Pa. L. Rev. 67, 93 (1960); see *id.* at 88-92, 107-109. Any judicial control or judicial review which might otherwise have been adequate to protect the defendant against these several separate impermissibilities was made impossible by the prosecution of the case from start to finish without definition of the charge or charges tried.

The requirement of *Cole* v. *Arkansas*, 333 U. S. 196, and *Shuttlesworth* v. *Birmingham*, 376 U. S. 940, is that a criminal charge be so defined, and its definition so consistently maintained throughout the prosecution, that a defendant can fairly present his case to trial and appellate courts, make and preserve his points of law and evidence, and obtain such appellate review as a State's procedures regularly make available. It is little enough to demand of the prosecution that it name the statute or common-law prin-

ciple under which it is proceeding in advance of trial and adhere to forms of regularity thereafter. *Cf. Russell* v. *United States*, 369 U. S. 749, 766-771. In Hamm's case, all efforts of defense counsel reasonably to delimit the charge were resisted. Nothing in the case prior to the close of the evidence gave defense counsel notice, for example, that the jury would be charged on theories of trespass involving a breach-of-the-peace component (R. Hamm 84-85), and therefore no evidence was presented by the defense for the purpose of persuading the jury on this issue. On the other hand, the prosecutor was permitted without objection to cross-examine the defendant concerning his motives for entering the McCrory store in the first instance (R. Hamm 75-77) after objection to cross examination of the defendant concerning an N. A. A. C. P. economic boycott of McCrory's was overruled on the theory that the defense had put "intent" in issue (R. Hamm 73). Application of regular rules of evidence in this posture was impossible, since neither the court nor defense counsel could have known what the issue of "intent" was, for want of definition of the crime charged. The Sixth Judicial Circuit, reviewing the jury's verdict, sustained it apparently under one statute and the Supreme Court of South Carolina under another—the two being equally plausible, and equally implausible, reconstructions of what the jury had done. The effect of this was to deprive Hamm of his statutory right of review by the Sixth Judicial Circuit, for if that court had viewed the charge as limited to §16-388(2)—as did the Supreme Court—it might have acquitted the defendant, for the reason discussed in Part III-A *supra*, or for insufficient proof of refusal to leave the premises, or otherwise; and such an acquittal would have been unreviewable by the South Carolina Supreme Court. *Spartanburg* v. *Winters*, 233 S. C. 526, 105 S. E. 2d 703 (1958) (alternative ground), and authorities cited. No conviction obtained on such a record can stand consistently with fundamental fairness.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the judgments below should be reversed.

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TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

Equal access.

SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Establishments affecting interstate commerce.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

Lodgings.

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

Restaurants, etc.

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

Theaters, stadiums, etc.

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

Other covered establishments.

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Operations affecting commerce criteria.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

"Commerce."

Support by State action.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

Private establishments.

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available

to the customers or patrons of an establishment within the scope of subsection (b).

Entitlement.

SEC. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Interference.

SEC. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

Restraining orders, etc.

SEC. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

Attorneys' fees.

(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

Notification of State.

(c) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

Community Relations Service.

(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): *Provided*, That the court may refer the matter to the Community Relations Service established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: *Provided further*, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

Hearings and investigations.

SEC. 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204(d) and may hold such hearings with respect thereto as may be necessary.

The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

Suits by Attorney General.

SEC. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending.

Designation of judges.

Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

Appeals.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

District courts; jurisdiction.

SEC. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

78 STAT. 246.

Enforcement.

(b) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

TITLE III—DESEGREGATION OF PUBLIC FACILITIES

Suits by Attorney General.

SEC. 301. (a) Whenever the Attorney General receives a complaint in writing signed by an individual to the effect that he is being deprived of or threatened with the loss of his right to the equal protection of the laws, on account of his race, color, religion, or national origin, by being denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof, other than a public school or public college as defined in section 401 of title IV hereof, and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly progress of desegregation in public facilities, the Attorney General is authorized to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

Costs, fees.

SEC. 302. In any action or proceeding under this title the United States shall be liable for costs, including a reasonable attorney's fee, the same as a private person.

SEC. 303. Nothing in this title shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in any facility covered by this title.

62 Stat. 749.

SEC. 304. A complaint as used in this title is a writing or document within the meaning of section 1001, title 18, United States Code.